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14. 2

No. 10990

v. 2426

United States
Circuit Court of Appeals

For the Ninth Circuit.

NATHAN NEWMAN, W. O. FILES, R. H.
SHAFFER, and BURT CAIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.


Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

OCT 17 1945

PAUL P. O'BRIEN,
CLERK



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No. 10990

United States
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Bail Bond on (Burt Cain).....	35
Bail Bond on (Nathan Newman).....	41
Bail Bond on (W. O. Files).....	46
Certificate of Clerk to Transcript of Record on	320
Cost Bond on (Burt Cain).....	38
Cost Bond on (Nathan Newman).....	44
Designation of Record on (CCA).....	322
Notice of (R. H. Shaffer).....	26
Notice of (W. O. Files).....	27
Notice of (Nathan Newman).....	28
Notice of (Burt Cain).....	30
Praeipie for Contents of Transcript of Record on	31
Statement of Points and Designation of Record on	322
Approval of Bill of Exceptions.....	319
Assignment of Errors by Nathan Newman, W. O. Files and Burt Cain	51

	Index	Page
Bail Bond on Appeal of:		
Burt Cain		35
W. O. Files		46
Nathan Newman		41
Bill of Exceptions		76
Approval of		319
Exhibit for Defendant:		
D—Arrangement made between Charles Malaby and International Import Co.		216
Exhibit for Government:		
34—Letter “Mr. Newman” signed “Os- car”, dated May 25, 1944.....		305
Instructions of Court re Record on Appeal		317
Order Extending Time		318
Motion in Arrest of Judgment.....		315
Sentence		317
Stipulation re Bill of Exceptions.....		319
Witnesses for Defendant Burt Cain:		
Cain, Burt		
—direct		270
—cross (Mr. Licking).....		278, 288
—cross (Mr. McGuire).....		287
—recalled, direct		312
—cross		312

Index	Page
Witnesses for Defendant Burt Cain—(Contd.)	
Mathes, Burke	
—direct	289
—cross	291
Matthias, Harry Drewes	
—direct	268
—cross	269
Witness for Defendant Lowenthal:	
Lowenthal, Oscar R.	
—direct	292
—cross (Mr. Licking) ..	304, 306, 307
—cross (Mr. Gillen)	306
—redirect	306
Witnesses for the Government:	
Barrotti, Enrico	
—direct	102
Benson, William H.	
—direct	147
—cross	149
—recalled, direct	242
—cross	244
Bird, Clyde	
—direct	81
—cross	85
Bryden, William P.	
—direct	143
—cross	145

Index	Page
Witnesses for the Government—(Contd.)	
Burnett, Ira	
—direct	164
—cross (Mr. Cannon)	166
—cross (Mr. McGuire)	167
Caputa, Guy	
—direct	118
Cardinelli, Jack	
—direct	132
—cross	134
Costa, Manuel, Jr.	
—direct	160
—cross (Mr. Cannon)	161
—cross (Mr. Ames)	161
—redirect	162
de Georgis, Pete	
—direct	137
—cross	141
Di Ricco, Luigi	
—direct	146
de Silva, John	
—direct	154
—cross	156
Ferretti, Charles	
—direct	100
Figone, Victor	
—direct	117
—cross	118

Index

Page

Witnesses for the Government—(Contd.)

Fuchslin, Martin

—direct	103
—recalled, direct	110
—cross (Mr. McGuire)	113
—cross (Mr. McDonald)	113
—cross (Mr. Gillen)	114
—recalled, direct	129
—cross	129
—redirect	129

Gabrielli, Vincenzo

—direct	93
—cross (Mr. McDonald)	95
—cross (Mr. Gillen)	95
—redirect	96

Goldstein, Gus

—direct	168
—cross (Mr. Cannon)	170
—cross (Mr. Ames)	171
—redirect	172, 173
—recross (Mr. Ames).....	172, 174
—recross (Mr. Cannon)	173

Johnson, William S.

—direct	97
---------------	----

Kusalo, John P.

—direct	135
—cross	137

Lichtenberg, Rudloph

—direct	99
---------------	----

Index	Page
Witnesses for the Government—(Contd.)	
Malaby, Charles	
—direct	183
—cross (Mr. Ames)	211
—cross (Mr. McGuire)	225
—cross (Mr. McDonald)	229
—cross (Mr. Cannon)	229
—cross (Mr. Gillen)	232
—redirect	233, 241
—recross (Mr. Gillen)	240
—recross (Mr. McDonald) ..	241, 242
—recross (Mr. McGuire)	242
—rebuttal, direct	308
—cross	309
—redirect	310
McKinnon, John A.	
—direct	149
—cross (Mr. McGuire)	152
—cross (Mr. Ames)	153
—cross (Mr. Gillen)	154
McNeil, Margaret	
—direct	124
—cross	127
—redirect	128
—recross	128
Nathanson, Joseph	
—direct	77
—cross	79
—redirect	79
—recross	80

Index**Page****Witnesses for the Government—(Contd.)****Newkirk, Richard**

—direct	162
—cross	163

Nomellini, Nello

—direct	145
—cross	146

Pitta, Amaro

—direct	156
—cross (Mr. Gillen)	158
—cross (Mr. Ames)	159
—redirect	159

Porfido, Joseph

—direct	159
---------------	-----

Reali, Peter

—direct	141
—cross	143

Rocco, Primo

—direct	179
---------------	-----

Smith, Elliot R.

—direct	130
—cross (Mr. Cannon)	131
—cross (Mr. McGuire)	132

Index	Page
Witnesses for the Government—(Contd.)	
Spenger, Frank	
—direct	104
—cross (Mr. Cannon)	107
—cross (Mr. Ames)	107
—cross (Mr. McDonald)	108
—cross (Mr. McGuire)	108
—redirect	108, 109
—recross	109
Thomason, Robert C.	
—direct	121
—cross	123
—redirect	123
Vincentini, Steve	
—direct	86
—cross (Mr. McDonald)	90
—cross (Mr. Gillen)	91
—redirect	92
—recross	92
Williams, Lester G.	
—direct	174
—cross	176
—redirect	178
Certificate of Clerk to Transcript of Record	
on Appeal	320
Cost Bond on Appeal of:	
Burt Cain	38
Nathan Newman	44

Index	Page
Demurrer by Nathan Newman	5
Indictment	2
Judgment and Commitment of:	
Burt Cain	22
W. O. Files	20
Nathan Newman	24
R. H. Shaffer	18
Minute Orders:	
Jan. 3, 1945—Order Demurrer Overruled, Plea of Not Guilty	7
Jan. 23, 1945—Waiver of Trial by Jury..	9
Feb. 2, 1945—Defendants Adjudged Guilty, Motions in Arrest of Judgments Denied, Sentences and Judgments	13
Apr. 2, 1945—Order Extending Time to Settle and File Bill of Exceptions.....	50
Apr. 11, 1945—Order Settling Bill of Ex- ceptions Continued	74
Motion for Arrest of Judgment by Nathan Newman	11
Names and Addresses of Attorneys of Record	1

Index	Page
Notice of Appeal by:	
Burt Cain	30
W. O. Files	27
Nathan Newman	28
R. H. Shaffer	26
Order Continuing Settling of Bill of Exceptions to May 1, 1945	74
Order Denying Motions in Arrest of Judgment	13
Order Extending Time to Settle and File Bill of Exceptions	50
Order Overruling Demurrer of Nathan Newman	7
Praecipe for Contents of Transcript of Record on Appeal	31
Sentences and Judgments (Minute Order of Feb. 2, 1945)	13
Statement of Points and Designation of Record on Appeal	322
Stipulation for Copying Original Exhibits in Printed Bill of Exceptions.....	34
Stipulation re Certification, etc., of Exhibits..	32
Stipulation re Omission of Title of Court and Cause, etc.	33

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Post Office Building,
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 29086-R

18 U.S.C.A. Section 88: (Conspiracy to violate
Title 50 U. S. Code, Appendix, Sections 904a-
925);

In the November 1944 term of said Division of
said District Court, the Grand Jurors thereof on
their oaths present:

That Charles Malaby, Nathan Newman, W. O.
Files, R. H. Shaffer, Oscar R. Lowenthal, Primo
Rocco, Burt Cain (hereinafter called said defend-
ants), at a time and place to said Grand Jurors un-
known, did unlawfully, wilfully, knowingly and
feloniously conspire and agree together and with
divers other persons to said Grand Jurors un-
known, to commit offenses against the laws of the
United States, to-wit, offenses in violation of Title
50 United States Code, Appendix, Sections 904a-
925, by wilfully selling and delivering and by wil-
fully offering to sell and deliver, a certain com-
modity, to-wit, distilled spirits (whiskey), at prices
over and in excess of the maximum prices duly
established by the Price Administrator [1*] by
regulations and orders duly made and promulgated
under the provisions of 50 United States Code, Ap-
pendix, Section 902(a), and that thereafter and
during the existence of said conspiracy and to effect
the object thereof, one or more of said defendants

*Page numbering appearing at foot of page of original certified
Transcript of Record.

as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in furtherance of said conspiracy:

1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearney Street, San Francisco, California;

2. On or about March 11, 1944, the defendants Charles Malaby, Nathan Newman and Oscar Lowenthal met together in the City of San Francisco;

3. On or about April 7, 1944, the defendant Oscar R. Lowenthal had a conversation with James Gibson and Elliott R. Smith at 1782 Seventh Street, Oakland, California.

4. On or about April 8, 1944 at 1782 Seventh Street, Oakland, James Gibson and Elliott R. Smith paid the defendants Charles Malaby and Nathan Newman the sum of \$1480.50;

5. On or about May 24, 1944 at Oakland, California, the defendants Charles Malaby and Nathan Newman received a check from James Gibson and Elliott R. Smith in the amount of \$1809.50;

6. On or about May 5, 1944, the defendant Charles Malaby, accompanied Martin Fuchlin to the premises known as 309 Kearney Street, and Martin Fuchlin there deposited \$1265.00 with the defendant W. O. Files;

7. On or about April 1, 1944, the defendant Oscar R. Lowenthal took the order of one Robert C. Thomason at 309 San Pablo Avenue, El Cerrito, California, for 100 cases of whiskey; [2]

8. On or about April 8, 1944, Robert C. Thomason paid the sum of \$2671.00 to Charles Malaby at 309 Kearney Street, San Francisco, in the presence of the defendants W. O. Files and Oscar R. Lowenthal;

9. On or about April 24, 1944 the defendant Charles Malaby called at the premises known as Spengers at 1919 4th Street, Berkeley, and later the defendant Charles Malaby accompanied Frank Spenger to the office of the defendant W. O. Files, at 309 Kearney Street, San Francisco, where Frank Spenger deposited \$13,736 and received a receipt therefor from the defendant W. O. Files.

FRANK J. HENNESSY,
United States Attorney

A true bill,

D. BOSSCHART,
Foreman.

Presented in Open Court and Ordered. Filed Dec. 20, 1944. C. W. Calbreath, Clerk. By J. P. Welsh, Deputy Clerk.

Approved as to Form:

..... [3]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 29086-R

UNITED STATES OF AMERICA,
Plaintiff and Appellee

vs.

CHARLES MALABY, NATHAN NEWMAN,
W. O. FILES, R. H. SHAFFER, OSCAR R.
LOWENTHAL, PRIMO ROCCO and BURT
CAIN,

Defendants and Appellants.

DEMURRER

Comes now Nathan Newman, defendant, herein,
and demurs to the indictment upon the following
grounds:

I.

That said indictment does not state a public offense against him.

II.

That said indictment is so indefinite, uncertain and ambiguous that this defendant is not advised of the charges which he is called upon to meet under said indictment.

Wherefore, the defendant, Nathan Newman, prays that the indictment herein may be quashed

and that he be discharged and allowed to go hence without day.

CANNON & CALLISTER,
Attorneys for Defendant,
Nathan Newman [4]

CERTIFICATE

I, David H. Cannon, one of the attorneys for the above named defendant, hereby certify that the above and foregoing Demurrer is filed in good faith and not for the purpose of delay and in my opinion is well taken in law.

Dated January 2, 1945.

DAVID H. CANNON

POINTS AND AUTHORITIES IN SUPPORT OF THE FOREGOING DEMURRER

I.

The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intents; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

U. S. vs. Cruikshank, 92 U.S. 542, 558.

U. S. v Bopp, et al., 230 Fed. 723.

Fuller vs. U. S., 114 Fed. (2d) 698.

II.

Reference in the indictment to the particular statute under which the indictment is drawn neither adds to, nor detracts from the sufficiency of the charge as contained in the indictment.

Biskind v. U. S., 281 Fed. 47 (CCA).

Johnson v. Biddle, 12 Fed. (2d) 366, 369.

III.

There is no sufficient charge in this indictment of an intention on the part of the alleged conspirators to violate a law of the United States. Such allegations in clear terms must be made or it is fatal to the indictment.

U. S. v. Morse, 287 Fed. 906.

Stokes v. U. S., 157 U. S. 187, 39 L. Ed. 667, 668.

[Endorsed]: Filed Jan. 3, 1945. [6]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 3rd day of January, in the year

of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

DEMURRER ON BEHALF OF NEWMAN
OVERRULED—PLEAS OF NOT GUILTY

This case came on regularly this day for arraignment. The defendant Charles Malaby was present with his attorney, Leslie Gillen, Esq. The defendants Nathan Newman and W. O. Files were present with their attorney, Fred. McDonald, Esq. The defendant R. H. Shaffer was present with his attorney, Leslie Gillen, Esq. The defendant Oscar R. Lowenthal was present with his attorney, A. J. McGuire, Esq. The defendant Burt Cain was present with his attorney, Charles Dreyfus, Esq. William E. Licking, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Licking, the defendants were called for arraignment. The defendants were informed of the return [7] of the Indictment by the United States Grand Jury, and asked if they were the persons named therein, and upon their answer that they were, and that their true names were as charged, said defendants were informed of the charges against them and stated that they understood the same. Counsel for defendants waived the reading of the Indictment.

Mr. McDonald filed a demurrer on behalf of the defendant Newman, which said demurrer was or-

dered overruled and to which ruling of the Court an exception was noted.

The defendants were called to plead. The following defendants each entered a plea of "Not Guilty": Charles Malaby, Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal and Burt Cain.

After hearing the attorneys, it is ordered that this case be set for trial on January 23, 1945. (Jury).

The defendant Primo Rocco was not present. On motion of Mr. Licking, it is ordered that this case be continued to January 10, 1945, for arraignment of said defendant.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 23rd day of January, in the year of our Lord on thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

DEFENDANTS WAIVED TRIAL BY JURY

This case came on regularly this day for trial. William E. Licking, Esq., Assistant United States

Attorney, was preesnt on behalf of the United States. The defendants were present with their respective attorneys: Charles Malaby with J. W. Ehrlich, Esq.; Nathan Newman with David Cannon, Esq.; W. O. Files and Fred. McDonald, Esq.; R. H. Shaffer with Leslie Gillen, Esq.; Oscar R. Lowenthal with Albert McGuire, Esq.; Primo Rocco with Miss Agnes O'Brien; and Burt Cain with Alden Ames, Esq., Burke Mathew, Esq., and S. E. Sheffey, Esq.

On motion of Mr. Ehrlich, it is ordered that the defendant Charles Malaby be allowed to withdraw his former plea of Not Guilty. Thereupon the defendant Charles Malaby withdrew his former plea of "Not Guilty" and entered a plea [9] of "Guilty", which said plea was ordered entered. On motion of Mr. Ehrlich and with the consent of Mr. Licking, it is ordered that the defendant Charles Malaby may be released on the bond heretofore filed, and that this case be continued to January 24, 1945, for pronouncing of judgment as to defendant Charles Malaby.

Miss O'Brien, on behalf of the defendant Primo Rocco, made a motion for severance, which said motion was ordered granted and that this case be continued to January 24, 1945, for trial as to defendant Primo Rocco.

Thereupon each of the defendants Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal and Burt Cain and the attorneys herein waived a trial by jury. On motion of Mr. McDonald, it is ordered that all witnesses be excluded from the

Court Room, with the exception of the witness testifying and Clyde Bird, the agent in charge of this case. Joseph Nathanson, Clyde Bird, Steve Vincentini, Vincenzo Gabrielli, Wm. S. Johnson, Rudolph Lichtenberg, Chas. Ferretti and Enrico Barroti were each sworn and testified on behalf of the United States. Mr. Cannon introduced in evidence and filed Defendants' Exhibit A. Mr. Licking offered certain exhibits which were numbered 1, 2, 3, 3-A, 3-B, 3-C, 4, 4-A, 5, 6, 6-A, 7, 7-A, 8, 9, 11, 12, 12-A, 13, 14, 15, 16, 16-A, 17, 18, 19, 19-A, 20, 20-A, 20-B, 21, 22, 22-A, 23 and 24 for identification. After hearing the attorneys, it is ordered that the further trial of this case be continued to January 24, 1945. [10]

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT

Comes now the defendant Nathan Newman and moves the court to refrain from entering a judgment against him based upon the court's finding of guilt in this case upon the following grounds:

1. That the said indictment does not state facts sufficient to constitute a punishable offense or any offense or crime against the laws or any law or against the Constitution of the United States, and particularly, said indictment does not state facts sufficient to constitute a violation of Title 18, United States Code, Section 88, a conspiracy to

violate title 50 to the United States Code, Appendix Section 904a-925.

Dated: February 2nd, 1945.

DAVID H. CANON

Attorney for Defendant

NATHAN NEWMAN [11]

I, David H. Cannon, do hereby certify that the above and foregoing motion is made in good faith and not for the purpose of delay, and in my opinion is well taken in law.

.....
DAVID H. CANNON

Attorney for Defendant

NATHAN NEWMAN

POINTS AND AUTHORITIES IN SUPPORT OF THE FOREGOING MOTION

Reference is respectfully made to written Memorandum on Behalf of Nathan Newman, Defendant, heretofore and on January 23, 1945, served and filed with the above entitled court and particularly upon the following authorities therein cited:

United States v. Eisenminger, 17 Fed. (2d) 816, 817.

United States v. Kissel, et al, CCA, N.Y. 173 Fed. 823.

United States v. Cruikshank, 292 U.S. 542, 558, 23 L.Ed. 588.

Pettibone v. United States, 148 U. S. 197, 37 L.Ed. 419, 422.

United States v. Carll, 101 U.S. 661; 26 L.Ed. 1135.

[Endorsed]: Filed Feb. 2, 1945. [12]

District Court of the United States Northern District of California Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 2nd day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

DEFENDANTS ADJUDGED GUILTY — MOTIONS IN ARREST OF JUDGMENTS DENIED—SENTENCES AND JUDGMENTS

The defendants and the attorneys being present as heretofore, the further trial of this case was this day resumed. After hearing the arguments of Mr. McGuire, Mr. McDonald, Mr. Ames, Mr. Gillen for the defendants, and William E. Licking, Esq., Assistant United States Attorney, for the United States, and the case being submitted and fully considered, It Is Ordered that each of the defendants Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal and Burt Cain be and he is here-

by Adjudged Guilty as charged in the Indictment. Attorneys Cannon, McDonald, Sheffy, Gillen and McGuire each made a motion in arrest of judgment on behalf of each defendant, which said motions were ordered denied and to which ruling of the Court an exception was noted. Mr. McDonald on behalf of defendant W. O. Files, Mr. Ames on behalf of defendant Burt Cain, [13] and Mr. McGuire on behalf of defendant Oscar R. Lowenthal each made a motion to refer the case to the Probation Officer, which said motions were ordered denied.

The defendants were called for judgment. After hearing the defendants and the attorneys, and said defendants having been now asked whether they have anything to say why judgment should not be pronounced against them, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant Nathan Newman, having been adjudged guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day and pay a fine to the United States in the sum of Ten Thousand (\$10,000.00) Dollars, and in default of payment of fine that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary.

Ordered and Adjudged that the defendant W. O. Files, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars, and that in [14] default of payment of fine said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Jail Type Institution.

Ordered and Adjudged that the defendant Oscar R. Lowenthal, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars, and that in default of payment of fine said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Jail Type Institution.

Ordered and Adjudged that the defendant R. H. Shaffer, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized [15] representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars, and that in default of payment of fine said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Jail Type Institution.

Ordered and Adjudged that the defendant Burt Cain, having been adjudged Guilty by the Court of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day and pay a fine to the United States of America in the sum of Ten Thousand (\$10,000.00) Dollars, and in default of payment of fine that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary. [16]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

R. H. SHAFFER

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Section 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant R. H.
Shaffer appearing in proper person, and by coun-
sel and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA Sec. 88. Defendant did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and
deliver certain distilled whiskey, at prices over
and in excess of the maximum prices established
by law, and did certain overt acts to effect the ob-
ject of said conspiracy, and the defendant having
been now asked whether he has anything to say
why judgment should not be pronounced against
him, and no sufficient cause to the contrary being
shown or appearing to the Court, It Is by the Court.

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months, and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a Jail Type Institution.

Entered in Vol. 35 Judg. and Decrees at page 328.

[Endorsed]: Filed and entered this 2nd day of February, 1945. [17]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

W. O. FILES

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Sections 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant W. O.
Files appearing in proper person, and by coun-
sel, and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA, Sec. 88. Defendant, did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and
deliver certain distilled whiskey, at prices over
and in excess of the maximum prices established by
law, and did certain overt acts to effect the object
of said conspiracy, and the defendant having been
now asked whether he has anything to say why judg-
ment should not be pronounced against him, and
no sufficient cause to the contrary being shown or
appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Nine (9) Months and pay a fine to the United States of America in the sum of Five Thousand (5,000.00) Dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a Jail Type Institution.

Entered in Vol. 35, Judg. and Decrees at page 329.

[Endorsed]: Filed and entered 2nd day of February, 1945. [18]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

BURT CAIN

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Sections 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant Burt
Cain appearing in proper person, and by coun-
sel, and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA, Sec. 88. Defendant did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and
deliver certain distilled whiskey, at prices over and
in excess of the maximum prices established by law,
and did certain overt acts to effect the object of
said conspiracy, and the defendant having been
now asked whether he has anything to say why
judgment should not be pronounced against him,
and no sufficient cause to the contrary being shown
or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day, and pay a fine to the United States in the sum of Ten Thousand (10,000.00) Dollars and that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Entered in Vol. 35 Judg. and Decrees at Page 330.

[Endorsed]: Filed and entered this 2nd day of February, 1945. [19]

District Court of the United States Northern
District of California, Southern Division

No. 29086-R

UNITED STATES

vs.

NATHAN NEWMAN

Criminal Indictment in one count for violation of
Title 18 USCA Sec. 88; (Conspiracy to violate
Title 50 U.S. Code, Appendix, Sections 904a-
925).

JUDGMENT AND COMMITMENT

On this 2nd day of February, 1945, came the
United States Attorney, and the defendant Nathan
Newman appearing in proper person, and by coun-
sel, and,

The defendant having been adjudged guilty by
the Court of the offense charged in the Indictment
in the above-entitled cause, to wit: Violation of
Title 18 USCA, Sec. 88. Defendant did, at a time
and place unknown, unlawfully conspire and agree
together and with divers other persons to sell and de-
liver certain distilled whiskey, at prices over and
in excess of the maximum prices established by law,
and did certain overt acts to effect the object of said
conspiracy, and the defendant having been now
asked whether he has anything to say why judg-
ment should not be pronounced against him, and
no sufficient cause to the contrary being shown or
appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day, and Pay a fine to the United States in the sum of Ten Thousand (10,000.00) Dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

W. E. LICKING

Assistant U. S. Attorney.

(Signed)

MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Entered in Vol. 35 Judg. and Decrees at Page 331.

[Endorsed]: Filed and entered this 2nd day of February, 1945. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—R. H. Shaffer, 309 Kearny Street, San Francisco, California.

Name and address of appellant's attorney—Leslie C. Gillen, 886 Mills Building, San Francisco 4, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to nine (9) months in the County Jail, and to pay a fine of Five Thousand (\$5,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above-mentioned on the grounds set forth below.

R. H. SHAFFER

Dated: February 3rd, 1945.

GROUND OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion

made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding appellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—W. O. Files, 309 Kearny Street, San Francisco, California.

Name and address of appellant's attorney—Fred McDonald, Mills Building, San Francisco 4, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to nine (9) months in the County Jail, and to pay a fine of Five Thousand (\$5,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

W. O. FILES

Dated: February 3rd, 1945.

GROUND'S OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed [23] errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding appellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Nathan Newman, 518 North Kilkea, Los Angeles, California.

Name and address of appellant's attorney—David H. Cannon, 650 South Spring Street, Los Angeles, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to one year and one day in the penitentiary and to pay a fine of Ten Thousand (\$10,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

NATHAN NEWMAN

Dated: February 3rd, 1945.

GROUND OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed [25] errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding ap-

pellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Burt Cain, 458 South Spring Street, Los Angeles, California.

Name and address of appellant's attorney—David H. Cannon, 650 South Spring Street, Los Angeles, California.

Offense: Conspiracy (Section 88, Title 18 United States Code) to violate Title 50, United States Code Appendix, Sections 904a-925.

Date of judgment—February 2nd, 1945.

Brief description of judgment or sentence—Entered judgment of conviction and defendant sentenced to one year and one day in the penitentiary and to pay a fine of Ten Thousand (\$10,000.00) Dollars.

Name of prison where now confined, if not on bail—County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

BURT CAIN

Dated: February 3rd, 1945.

GROUNDS OF APPEAL

That the court erred in refusing to grant this appellant's motion to dismiss and refusing to acquit this appellant upon his motion made at the close of the prosecution's case and upon his motion made at the close of all of the evidence in the case; that the court erred in refusing to grant appellant's motion for arrest of judgment; that the trial court committed [27] errors in the admission and rejection of evidence all duly excepted to; that there was not sufficient or any evidence to justify finding appellant guilty; that the indictment does not state a public offense.

[Endorsed]: Filed Feb. 3, 1945. [28]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please issue a certified transcript of the following matters and documents, including endorsements in the above entitled cause:

1. Indictment.
2. Demurrers to the Indictment filed by the above named defendants.
3. Order overruling Demurrers.
4. Motions for Arrest of Judgments and Orders Denying the same.

5. Sentence and Judgment.
6. Notices of Appeal.
7. Assignment of Errors.
8. All Stipulations and Orders of Court in re. extension of time to prepare, serve or settle the Bill of Exceptions.
9. Bonds on Appeals and Cost Bonds.
10. Bill of Exceptions as approved and allowed by the Court.
11. Order Approving and Settling Bill of Exceptions.
12. Stipulation for copying original exhibits into printed Bill of Exceptions.
13. Stipulation for Certification to the Circuit Court of certain exhibits.
14. Stipulation re eliminating title of Court and Cause in printing in record and this Praecipe.

DAVID H. CANNON

Attorney for said Defendants
and Appellants. [29]

[Acknowledgment of receipt of copy]

[Endorsed]: Filed Mar. 2, 1945. [30]

[Title of District Court and Cause.]

STIPULATION RE. CERTIFICATION, ETC.,
OF EXHIBITS

It is hereby stipulated by and between counsel for appellants and counsel for respondent, that all exhibits in the above entitled action which have

not been copied in the Bill of Exceptions, shall, by the Clerk of the District Court be certified and forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 2nd day of March, 1945.

DAVID H. CANNON

Attorney for said Defendants
and Appellants.

FRANK H. HENNESSY

United States Attorney.

By W. E. LICKING

Ass't United States Attorney.
Attorney for Plaintiff and
Respondent.

It is so ordered.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 3, 1945. [31]

[Title of District Court and Cause.]

STIPULATION RE. OMISSION OF TITLE OF
COURT AND CAUSE, ETC.

It is hereby stipulated by and between the parties hereto and their respective attorneys in the above entitled cause, that the Clerk of the Court may, in preparing the certified transcript of the record, omit from the caption of all documents, except the indictment, filed in said cause, the title of the court

and cause, and insert therein the words "Title of Court and Cause."

It is further stipulated that the Clerk of the Court may omit all words and figures upon the back of all documents in the record, except the filing mark thereof.

Dated this 2nd day of March, 1945.

DAVID H. CANNON

Attorney for said Defendants
and Appellants.

FRANK J. HENNESSY

United States Attorney.

By W. E. LICKING

Ass't United States Attorney
Attorney for Plaintiff and
Respondent.

It is so ordered.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 3, 1945. [32]

[Title of District Court and Cause.]

STIPULATION FOR COPYING ORIGINAL
EXHIBITS IN PRINTED BILL OF EX-
CEPTIONS

It is hereby stipulated by and between the parties hereto, through their respective attorneys, that all exhibits which are omitted and not copied in the proposed Bill of Exceptions, may be copied by the

printer from the original exhibits as filed in this case, at the respective places so specified for said exhibits in the Bill of Exceptions.

Dated: This 2nd day of March, 1945.

DAVID H. CANNON

Attorney for said Defendants
and Appellants.

FRANK J. HENNESSY

United States Attorney.

By W. E. LICKING

Ass't United States Attorney
Attorney for Plaintiff and
Respondent.

It is so ordered.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 3, 1945. [33]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Bond #824-0018

Know All Men by These Presents:

That we, Burt Cain, of the County of Los Angeles, California, as Principal, and the Northwest Casualty Company, a Washington Corporation, as Surety, are jointly and severally held firmly bound unto the United States of America in the sum of Ten Thousand and No/100 Dollars (\$10,000.00), for the payment of which sum we and each of us

bind themselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division, in an action pending in the said Court in which the United States of America is Plaintiff and Burt Cain was Defendant, a judgment and sentence was made, given rendered and entered against the said Burt Cain in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Burt Cain, he was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000; and

Whereas, the said Burt Cain has filed a notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and [34]

Whereas, the said Burt Cain has been admitted to bail pending the decision upon said appeal in the sum of Ten Thousand and No/100 Dollars (\$10,000.00)

Now, Therefore, the conditions of this obligation are such that if said Burt Cain shall appear in per-

son, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said Burt Cain shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Burt Cain shall surrender himself in execution of said judgment and sentence, if the judgment and sentence be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit; and if the said Burt Cain will appear for trial in the District Court of the United States in and for the Northern District of California, Southern Division on such day or days as may be appointed for retrial by said District Court, if the judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

BURT CAIN

Principal

(Seal)

NORTHWEST CASUALTY

COMPANY, a Washington
Corporation

By A. W. APPEL

Attorney-in-Fact. [35]

This Is An Appearance Bond And Cannot Be
Construed As a Guarantee for Fines.

(Justification of Surety)

Approved as to form:

FRANK J. HENNESSY

United States Attorney.

By WILLIAM LICKING,

Assistant United States

Attorney.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

DAVID H. CANNON

Attorney for Defendant and
Appellant.

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

(Here Follows Certified Copy of Power of Attorney Issued to A. W. Appel)

[Endorsed]: Filed Mar. 12, 1945. [36]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

The premium charge on this bond is \$10.00 per annum.

That we, Burt Cain, of the County of Los Angeles, California, as Principal, and United States Fidelity and Guaranty Company, a Corporation Organ-

ized and Existing Under the Laws of the State of Maryland with Principal Office in the City of Baltimore, State of Maryland, and Authorized to Transact Business in the State of California, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of \$250.00, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division in an action pending in the said Court in which the United States of America is plaintiff and Burt Cain was defendant, a judgment and sentence was made, given, rendered and entered against the said Burt Cain in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Burt Cain, He was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000.00; and

Whereas, the said Burt Cain has filed a notice of appeal from the said conviction and from the said judgment and [37] sentence, appealing to the

United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Burt Cain, the principal here, shall prosecute his appeal with effect and answer all costs, if he fails to make his said plea good, then the said obligation shall be null and void, otherwise to remain in full force and virtue.

BURT CAIN

Principal.

(Seal)

UNITED STATES FIDELITY
AND GUARANTY
COMPANY

By ERNEST W. COPELAND,
Attorney in Fact.

(Justification of Surety)

Approved as to form:

FRANK J. HENNESSY

United States Attorney

By WILLIAM E. LICKING

Assistant United States
Attorney.

Attorney for Plaintiff.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

• DAVID H. CANNON

Attorney for Defendant and
Appellant. [38]

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 12, 1945. [39]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

The premium charge on this bond is \$200.00 per annum.

Know All Men by These Presents:

That we, Nathan Newman, of the County of Los Angeles, California, as Principal and United States Fidelity and Guaranty Company, a Corporation Organized and Existing Under the Laws of the State of Maryland with Principal Office in the City of Baltimore, State of Maryland, and Authorized to Transact Business in the State of California, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of \$10,000.00, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division in an action pending

in the said Court in which the United States of America is plaintiff and Nathan Newman was defendant, a judgment and sentence was made, given, rendered and entered against said Nathan Newman in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Nathan Newman, he was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000.00; and

Whereas, the said Nathan Newman has filed a notice of appeal from the said conviction and from the said judgment [40] and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Nathan Newman has been admitted to bail pending the decision upon said appeal in the sum of \$10,000.00,

Now, Therefore, the conditions of this obligation are such that if said Nathan Newman shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day of days as may be appointed for the hearing of said cause in said court and prosecute his appeal; and if the said Nathan Newman shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Nathan Newman shall surrender himself in execution of said judgment and sentence, if the

judgment and sentence be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit; and if the said Nathan Newman will appear for trial in the District Court of the United States in and for the Northern District of California, Southern Division on such day or days as may be appointed for retrial by said District Court, if the judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

NATHAN NEWMAN

Principal.

(Seal)

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

By ERNEST W. COPELAND,
Attorney in Fact.

(Justification of Surety) [41]

Approved as to form:

FRANK J. HENNESSY

United States Attorney

By WILLIAM E. LICKING

Assistant United States
Attorney.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

DAVID H. CANNON

Attorney for Defendant and
Appellant.

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 12, 1945. [42]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The premium charge on this bond is \$10.00 per annum.

Know All Men by These Presents:

That we, Nathan Newman, of the County of Los Angeles, California, as Principal, and United States Fidelity and Guaranty Company, a Corporation organized and Existing under the Laws of the State of Maryland with Principal Office in the City of Baltimore, State of Maryland, and Authorized to Transact Business in the State of California, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of \$250.00, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the District Court of the United States in and for the Northern District of California, Southern Division in an action pending

in the said Court in which the United States of America is plaintiff and Nathan Newman was defendant, a judgment and sentence was made, given, rendered and entered against the said Nathan Newman in the above entitled action, whereas he was convicted as charged in the Indictment.

Whereas, in said judgment and sentence so made, given, rendered and entered against said Nathan Newman, he was by said judgment sentenced to imprisonment for one year and one day under said Indictment, and to be imprisoned in an institution of the penitentiary type for such term of one year and one day and to pay a fine of \$10,000.00; and

Whereas, the said Nathan Newman has filed a notice of [43] appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Nathan Newman, the principal here, shall prosecute his appeal with effect and answer all costs, if he fails to make his said appeal good, then the said obligation shall be null and void, otherwise to remain in full force and virtue.

NATHAN NEWMAN

Principal

(Seal)

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

By ERNEST E. COPELAND,
Attorney in Fact.

(Justification of Surety)

Approved as to form:

FRANK J. HENNESSY

United States Attorney

By WILLIAM E. LICKING

Assistant United States
Attorney.

Attorney for Plaintiff.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

DAVID H. CANNON

Attorney for Defendant and
Appellant.

The foregoing bond is approved this 12th day of March, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Mar. 12, 1945. [44]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Bond #30531

Know All Men by These Presents:

That we, W. O. Files, of the City and County of San Francisco, State of California, as principal, and the National Automobile and Casualty Insurance Company, a California corporation, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of Five

Thousand (\$5,000.00) Dollars, for the payment of which sum we, and each of us, bind ourselves, our heirs, executors and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 2nd day of February, 1945, at a term of the United States District Court in and for the Northern District of California, Southern Division, in an action in said court numbered 29086-R, in which the United States of America is plaintiff and W. O. Files was defendant, judgment and sentence was made, given, rendered and entered against the said W. O. Files in the above entitled action, whereas he was convicted as charged in said action.

Whereas, in said judgment and sentence so made, given, rendered and entered against said W. O. Files in said action, he was sentenced by said judgment to imprisonment as follows: nine (9) months in the County Jail and to pay a fine of \$5,000.00.

Whereas, the said W. O. Files has filed a Notice of Appeal from said conviction and from said judgment and sentence appealing to the United States Circuit Court for the Ninth Circuit; and

Whereas, the said W. O. Files has been admitted to bail pending the decision upon said appeal in the sum of Five [45] Thousand (\$5,000.00) Dollars;

Now, Therefore the conditions of this obligation are such that if said W. O. Files shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such

day or days as may be appointed for the hearing of said cause in said Court and shall prosecute his appeal, and if said W. O. Files shall abide by and obey all orders made by said United States Circuit Court of Appeals for the Ninth Circuit, and if said W. O. Files shall surrender himself in execution of such judgment and sentence if the judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, and if said W. O. Files will appear for trial in the District Court of the United States in and for the Northern District of California, Southern Division, on such day or days as may be appointed for the re-trial by said District Court if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise, to remain in full force and effect.

This recognizance shall be deemed and construed to contain the "express agreement," summary judgment and execution thereon mentioned in Rule 10 of the District Court.

W. O. FILES

Principal

(Seal)

NATIONAL AUTOMOBILE
AND CASUALTY INSUR-
ANCE CO., (a California Cor-
poration)

By A. C. GORMAN

Attorney-in-Fact. [46]

(Justification as to Surety. Justification as to Principal)

I hereby certify that I have examined the above bond and that, in my opinion, the form thereof is correct and the surety thereon is qualified.

FRED McDONALD

Attorney for Defendant and
Appellant

The foregoing bond is approved this 13th day of March, 1945.

FRANK J. HENNESSY

United States Attorney

By W. E. LICKING

Assistant United States
Attorney

The foregoing bond is approved this 13th day of March, 1945.

MICHAEL J. ROCHE

Judge of the United States
District Court

[Endorsed]: Filed Mar. 13, 1945. [47]

At a Stated Term, to wit: The October Term 1944, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the second day of April in the year of our Lord one thousand nine hundred and forty-five.

Present:

Honorable Francis A. Garrecht, Circuit Judge,
Presiding,

Honorable Clifton Mathews, Circuit Judge,

Honorable William Healy, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO SETTLE
AND FILE BILL OF EXCEPTIONS

Upon consideration of the application of Mr. David H. Cannon, counsel for appellants, and of his affidavit in support of such application, and stipulation of Mr. William E. Licking, Assistant United States Attorney, counsel for appellee, and by direction of the Court,

It Is Ordered that the appellants herein may have to and including April 15, 1945, within which to prepare, serve and lodge the proposed bill of exceptions herein, and to file their assignments of error; that the appellee have ten days thereafter within which to file its proposed amendments to the bill of exceptions, and that the time for settling and filing of the bill of exceptions be, and the same is hereby extended to May 1, 1945. [48]

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at

the City of San Francisco, in the State of California, this 3rd day of April, 1945.

PAUL P. O'BRIEN

Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Apr. 3, 1945. [49]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY NATHAN
NEWMAN, W. O. FILES AND BURT CAIN

Come now the above named defendants and in connection with the Appeal herein say and each of them says:

That in the record and proceedings prior to and during the trial of the above entitled cause in said District Court, error has intervened to their and his prejudice and make the following Assignment of Errors which they aver occurred in the trial of said cause, to-wit:

I.

Said District Court erred in denying their Demurrers to the indictment herein upon each and all of the grounds set out in said Demurrers, and requiring them to plead to the said indictment.

II.

Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Nathan Newman,

W. O. Files and Burt Cain, of the charges made in said indictment. The grounds of said motions [50] were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, to answer to the said indictment.

III.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss the said indictment, and to acquit them on each of the charges in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, and would not and does not tend to prove that the said Nathan Newman, W. O. Files and Burt Cain are guilty in any manner or form as charged in said indictment.

IV.

Said District Court erred in entering judgment against and in pronouncing sentence upon the said defendants, Nathan Newman, W. O. Files and Burt Cain, in that the matters and things alleged in said indictment do not constitute an offense against the laws of the United States.

V.

The District Court erred in denying the motions made by the said defendants after the Court had found the defendants guilty in the above entitled cause, for an order arresting the judgment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or any law, [51] or against the constitution of the United States, and particularly said indictment does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VI.

Said District Court erred in overruling the objections of the said defendants to the admission of any evidence on this indictment, and admitting in evidence the testimony of the plaintiff's witnesses in support of the charges set out in said indictment. The grounds of the objections and the exceptions were as follows:

Mr. Licking: Q. Mr. Nathanson, you are an employee of the United States Government?

Mr. Cannon: I object to the introduction of any evidence on this indictment on the ground it does not state an offense. I can state it very briefly to you Honor. I know the matter was raised by demurrer, but I prepared a rather lengthy brief on the expectation of this objection. I think I can point out very briefly why this indictment does not state an offense.****

The Court: For the purpose of the record, it will be denied.

Mr. Cannon: Exception. (14, 16)

VII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Steve Vincentini, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objections and the exceptions were as follows: [52]

I had a discussion with him (Malaby) about whisky.

Q. What did he say and what did you say?

Mr. Ames: I object to that. I will have to object, your Honor, on the ground it is incompetent, irrelevant and immaterial. (64) ****

Mr. Cannon: I just want to add a ground to the objection suggested by Judge Ames. The further objection is that it is hearsay as to all the defendants in this case. (65)****

The Court: I will allow it subject to a motion to strike and over the objection of all the counsel.

Mr. Cannon: Exception. (65)

Mr. Cannon: I assume your Honor does not care to have us repeating objections. We understand

the objection heretofore made to hearsay testimony applies also to any conversation which this witness may have had with the defendants Files and Shaeffer, as far as my client is concerned.

The Court: All right.

Mr. Cannon: Exception to the ruling. (67)

1 ***

Q. At the time you had your conversation with Mr. Files and Mr. Shaeffer when Gabrielli was there, what was said, do you remember?

Mr. Ames: I make the objection the conversation would be hearsay as far as the defendant Cain is concerned, and not competent evidence to prove the crime alleged in the indictment.

Mr. Licking: This is a conversation which I will introduce, and I intend to connect it up to the satisfaction of the Court to show that it is a statement made by conspirators during the course of the conspiracy, or to cover up the existence of a conspiracy.

The Court: Overruled. [53]

Mr. Ames: Exception, your Honor, on behalf of the defendant Cain and all the defendants. (77-78).

VIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, William S. Johnson, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the

ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was said by him? (Rocco)

Mr. Cannon: I make a general objection on behalf of all the defendants to this conversation, and to whatever questions that may be gone into on the examination with respect to this conversation had out of the presence of any of the defendants, on the ground it is hearsay.

The Court: Overruled. I will allow it under the same ruling.

Mr. Cannon: Exception.

The Court: It is going in subject to your motion to strike and over your objection. Unless it is connected up——

Mr. Cannon: I may have the exception to the whole line of testimony, your Honor?

The Court: Yes. (114-115)

IX.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Charles Ferrati, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purpose of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the [54] ceiling price.

The grounds of the objection and the exception were as follows:

Q. Do you recall what you said to Mr. Rocco and what he said to you?

A. When Mr. Johnson was finished he called me over there——

Mr. Cannon: Your Honor, I offer an objection at this time on behalf of all the defendants to this conversation, and to questions that may be asked of this witness along the same line with respect to conversations on the ground it is hearsay and has no value in the case as against any of these defendants. In anticipation of your Honor's ruling I will take an exception to it, and may I have an understanding the objection and exception runs to the entire line of testimony?

The Court: Yes. Objection overruled. (126-127)

X.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Enrico Barrotti, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What did Rocco say when he introduced you to Burnett?

Mr. Cannon: If the Court please——

Mr. Licking: I will stipulate, if the Court please, that the same objection heretofore made by counsel is interposed to this and the Court has made the same ruling. [55]

Mr. Cannon: It is hearsay as to these defendants and we will take an exception to the ruling, and the understanding is that we have a running objection and running exception to the testimony.

The Court: Let the record so show. (132)

XI.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Frank Spenger, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. About a week, you say, before you signed the first of the papers you after signed in the transaction; what was your conversation?

Mr. Cannon: If your Honor please, I object on behalf of all the defendants except Mr. Malaby. I make the objection jointly and severally, and anticipating your Honor's ruling I would like to take an exception to an adverse ruling. I object on the ground it is hearsay as to the other defendants. If

it is agreeable with your Honor I would like to have the objection running throughout the conversation as between this witness and any other person out of the presence of any of these defendants. I take an exception to the ruling.

The Court: The objection will be overruled. I think I have indicated clearly, I attempted to, that unless it is connected up it will go out.

Mr. Cannon: I understand that. I am afraid, though, if we ever have to go to a circuit court that the circuit court [56] may not understand the force of my objection.

The Court: I think under the new rules even an exception need not be taken. (144)

XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Martin Fuchslin, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was your conversation with Mr. McKinnon? (167) ****

Mr. Cannon: It is hearsay as to these defendants; it does not prove or tend to prove any issue.

Mr. Licking: That is the same objection you

have to all the similar testimony that has been introduced.

Mr. Cannon: Yes.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection?

The Court: Unless it is connected up it will go out. (168)

(Witness continuing:)

We were talking about the whisky shortage and he said he knew where we could get some at about \$57 a case including everything.

Q. * * * * Was there any discussion at that time about the ceiling price or OPA price?

A. Well, I knew it was over the ceiling price.

Q. You knew it was over the ceiling price?

A. Yes.

Mr. Cannon: I move to strike it out as immaterial. [57]

Mr. Licking: If he knew it merely of his own knowledge,—if he knew if from the conversation.

Mr. Cannon: I move it be stricken out.

The Court: What is your objection?

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these pur-

chasers, himself, became pro tanto a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whisky became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser.

Mr. Cannon: I think I have made my objection clear to the court. I will take a ruling.

The Court: Objection overruled.

Mr. Cannon: Exception. (169-170)

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Guy Caputa, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whisky over the ceiling price, and the collection of money for the amount paid for the whisky above the ceiling price. The grounds of the objections and the exceptions [58] were as follows.

Q. What did he say and what did you say?

Mr. Cannon: At this time I object on the ground it is hearsay as far as all the other defendants are concerned, and I object to the testimony on that ground.

The Court: Overruled.

Mr. Cannon: Exception, and I reserve a motion to strike at a later period in the event it is not connected up.

The Court: Very well.

Mr. Cannon: Exception to your Honor's ruling.
(190-191)

Mr. Cannon: If your Honor please, at this time counsel and I have agreed upon the following stipulation, and that is, on all of the conversations that are being elicited from any witness which conversations are out of the presence of certain of the defendants, it will be deemed for the purpose of the record that those defendants were absent when the conversation was held, and I object to the testimony on the ground that it is hearsay and reserve a motion to strike it in the event at a later time it is not connected up.

Mr. Licking: I am perfectly willing if the Court is that that objection may be deemed taken to all conversations which I am eliciting.

The Court: Very well. (208)

XIV.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and in admitting in evidence the following exhibits, identified by various witnesses, produced by the prosecution. The said exhibits being as follows:

Government's exhibits 1; 2; 3; 3-A; 3-B; 3-C; 4; 4-A; 4-B; 5; 6; 6-A; 7; 7-A; 7-B; 8; 8-A; 9; 9-A; 10; 10-A; 11; 12; 12-A; [59] 12-B; 13; 13-A; 13-B; 13-C; 14; 14-A; 14-B; 14-C; 15; 16; 16-A; 17; 18; 18-A; 18-B; 19; 19-A; 20; 20-A; 20-B; 21; 22; 22-A; 23; 25; 25-A; 26; 26-A; 26-B; 26-C; 27; 28; 29; 30.

The grounds of the objections and the exceptions were as follows:

Mr. Cannon: It is hearsay as to all defendants. I make the objection jointly and severally on behalf of each defendant.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 1 for Identification was received in evidence.)

Mr. Licking: I now offer Government's Exhibit 2 for Identification against the defendants and all of them. (629-630-631)****

Mr. Cannon: To which I object on the ground it is incompetent, irrelevant and immaterial, no proper or any foundation laid as to any defendant, and I object to it on behalf of each defendant separately on the ground it is hearsay.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 2 for Identification was received in Evidence.)

Mr. Licking: May I have now Government's Exhibit 3 for Identification, the invoices covering the Vincentini transaction at Stockton? In connection with that, the Govenment's Exhibit 3-A for

Identification, consisting of certified check debit, receipt signed by Mr. Malaby referring to the Files escrow, and also a receipt signed by Mr. Files for \$2100 dated April 20, 1944; also as part of that a photostatic copy of a note signed by Mr. Files and Mr. Shaeffer, defendant Files and defendant Shaeffer, dated June 21, 1944, agreeing to pay \$3,668 to Steve Vincentini. [60]

Mr. Cannon: I make the same objection on behalf of all defendants jointly and severally, and particularly to the promissory note of June 21, 1944 attached as part of that exhibit offered, it being a note signed by Mr. Files and Mr. Shaeffer, on the ground it is hearsay as to anybody other than those two defendants.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Licking: I also offer 3-B under the same statement of facts as this.

Mr. Ames: If your Honor please, I particularly make a further objection on the part of the defendant Cain and also for the benefit of all the defendants and for and on their behalf. I object to the introduction in evidence of any of these vouchers or bills, whatever they may be called, invoices, for the additional reason that this particular one, Exhibit 3, and all like it, do not in any degree show any violation whatsoever of the statute upon which the prosecution lies. On the contrary, these invoices show that these goods were sold at the ceiling price and nothing more. I make that general objection. I am going to make an objection to

all of these documents for the reason that they do not prove any participation in any crime whatsoever.

The Court: The objection will be overruled.

Mr. Ames: Exception.

(U. S. Exhibits 3, 3-A and 3-B for Identification were received in evidence.)

Mr. Licking: I also offer Government's Exhibit 3-C under the same statement of facts.

Mr. Cannon: I make the same objection on the same grounds.

Mr. Ames: I make the same objection on the same grounds.

The Court: The objection is overruled. [61]

Mr. Cannon: Exception.

Mr. Ames: Exception.

(U. S. Exhibit 3-C for Identification was received in evidence.)

Mr. Licking: I am perfectly willing to stipulate in the record, your Honor, that the same general objection heretofore offered by counsel to the exhibits I have offered be entered in the record.

Mr. Cannon: As far as my client is concerned, we object to the offer of each and all of these exhibits that counsel has offered or is about to offer, and we make the objection on behalf of each and every defendant, jointly and severally, on the following grounds: that they are incompetent, irrelevant and immaterial, because they have no bearing upon any issue in the case, and on the further ground that they are hearsay as to these defend-

ants; on the further ground that they are or could have no probative value on the proving of any conspiracy, because they relate to past transactions, and after the completion of the crime which the indictment alleges was committed. In other words, many of these documents and transactions relate to occurrences subsequent to the date upon which the alleged conspiracy was complete, the crime of conspiracy was complete.

Mr. Licking: What date do you contend the conspiracy was complete?

Mr. Cannon: The date when the Court finds, if it does so find, that the first overt act alleged in the indictment was committed. I make that statement so there will be no question of the stand we take in the matter. Counsel yesterday sought to establish——

Mr. Licking: I didn't particularly seek to do it, counsel.

Mr. Cannon: If I may have that running objection on behalf of each and all of the defendants, it may be understood [62] that the objection goes to the offer of each and all of them, and I will not interrupt any more.

The Court: Your objection will be overruled.

Mr. Cannon: May I have a stipulation?

Mr. Licking: Yes, I am perfectly willing to stipulate for the purpose of the record that that objection may be considered as a running objection to all of the exhibits I propose to introduce.

The Court: Very well.

Mr. Ames: And so far as the documents are concerned, they could tend to prove no crime as alleged in the indictment. I make that objection on behalf of the defendants.

The Court: The objection is overruled.

Mr. Ames: Exception.

XV.

Said District Court erred in denying the motion of the defendants to strike from the record certain testimony offered and received on behalf of the prosecution. The grounds of the motion and the exception to the ruling of the Court being as follows:

Mr. Sheffy: At this time, your Honor, I want to present a motion on behalf of all of the defendants, jointly and severally, to strike from the record certain testimony as to conversations that were admitted by the court subject to a motion to strike, those conversations being the conversations that were had with some of the defendants with third persons not in the presence of the other defendants.

I think I can make the motion general after stating, making reference to the testimony of one or two of the witnesses. For example, the witness Steve Vincentini, who testified he contacted Mr. Malaby in his apartment and talked about whisky, that there was nobody present but himself and Mr. Malaby, and [63] the court permitted the witness to state what conversation was had in Mr. Malaby's presence, subject to a motion to strike, and later he said as to the conversation with Malaby the mo-

tion would apply to all the defendants except the defendant Malaby. He testified that after talking with Mr. Malaby in this room that he then went to the office and talked to Mr. Files, Mr. Malaby and Mr. Shaeffer, and the court permitted, subject to a motion to strike, the conversation that was had at that place to be given, and in that instance the motion would be on behalf of the other defendants who were not present at that time.

The motion, therefore, is presented in each instance on behalf of those defendants who were not present at the time the conversations were had. I can go through my notes and take up each witness, witness by witness.

Mr. Licking: I am perfectly willing to stipulate that we haven't introduced testimony relating to any conversation at which all of the proposed defendants were present. There has apparently been no such conversation.

Mr. Sheffy: That is true, Mr. Licking, but in order to have the matter straight in the record, instead of taking each witness, witness by witness, I believe that I can make the general motion on behalf of the defendants who were not present at conversations testified to by one or more of the defendants (sig. witnesses), when the other defendants were not present, and as to all of that testimony I present to the court now a motion to strike that testimony. May it be stipulated, Mr. Licking, that my motion goes to the testimony of all of the witnesses?

Mr. Licking: If it is agreeable to the court, and the record may also indicate that that objection has been introduced as to each conversation as to which there has been testimony, and the objection has been entered and a motion to strike is [64] now made on behalf of those defendants who were not present at that conversation on the ground that as to them, I presume, it is hearsay.

Mr. Sheffy: Hearsay; and on the further ground the statements of one of the alleged conspirators not in the presence of the others cannot be used to prove the conspiracy.

The Court: Is the matter submitted?

Mr. Sheffy: Yes, your Honor.

The Court: The motion will be denied.

Mr. Sheffy: Exception. (654-655-656)

Mr. Cannon: If the Court please, may I just offer this further suggestion, that with respect to the motion which is made on behalf of all of the defendants that we call your Honor's attention particularly to all of the testimony that was introduced in evidence here bearing on any transaction or any conversation had, and also with respect to any documentary evidence introduced bearing upon a transaction subsequent to April 24, 1944, and make the motion specifically in behalf of each defendant not definitely connected by his personal presence with any transaction occurring subsequent to April 24, 1944.

* * * *

The Court: The motions, and each of them, will be denied.

Mr. Cannon: Exception in each case.

Mr. McDonald: May it please the Court, on behalf of the defendant W. O. Files I wish to adopt on his behalf and make part of this record each and every motion made by Mr. Sheffy and Mr. Cannon.

I further move to strike from the record all evidence, oral or documentary, in reference to the transaction involving the witness Figone, on the ground the same is incompetent, [65] irrelevant, and immaterial, and hearsay as to the defendant Files, as the conspiracy or no part thereof has been proven.

I also wish to make the motion on his behalf on the same grounds in reference to the witness McNeil; upon the same ground as to the witness Pete de Georgis; upon the same ground as to the witness Pete Reali; upon the same ground as to the witness Bryden; upon the same ground as to the witness Manuel Costa; upon the same ground as to the witnesses Lichtenberg and Johnson; upon the same ground as to the witness Barotti; upon the same ground as to the witness Ferretti; upon the same ground as to the witness Elliot Smith; upon the same ground as to the witness Caputa; upon the same ground as to the witness Kusalo; upon the same ground respecting a man by the name of Abrams, from Santa Rosa; upon the same ground as to any transaction involving John Di Silva; upon the same ground as to a certain money order sent to the witness Rocco; upon the same ground as to the letter from Malaby to the witness Burnett; and upon the same ground as to any testimony in refer-

ence to a receipt from Malaby to a man named Sargiani.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. McDonald: Exceptions. (660)

XVI.

Said district court erred in denying the motion of the defendants to strike from the record certain testimony offered and received on behalf of the prosecution. The grounds of the motion and the exception to the ruling of the court being as follows:

Mr. Cannon: Exception taken jointly and severally.

At this time, if the Court please, I make at the conclusion of the entire case, I move the Court to dismiss the indictment as to each defendant and to acquit each defendant on the grounds heretofore stated, first, the indictment does not state any [66] offense punishable by any laws of the United States or under the Constitution of the United States. I make the motion further on the ground the indictment is so indefinite and so uncertain as to be insufficient to place the defendants or any of them on notice of what they are required to meet. And I also make the motion on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged. (835)

* * * *

The Court: —it is clearly the duty of the Court to deny your motion. (838)

Mr. Gillen: Very well, your Honor.

Mr. Cannon: I take exception on behalf of each defendant jointly and severally to the denial of the motion.

XVII.

Said District Court erred in denying the motion made by the defendants to require the prosecution to elect on which of the overt acts set out in the Indictment the prosecution would rely for a conviction. The grounds of the motion and the exception to the ruling of the court being as follows:

Mr. Cannon: At this time I make a motion to require the prosecution to elect on which of the overt acts that are specifically alleged in the indictment it will rely for a conviction in this case.

Mr. Licking: All of them. (838-839)****

Mr. Licking: I said all of them, counsel. (839)

* * * *

The Court: All of the overt acts alleged in the indictment.

* * * *

Mr. Cannon: I take exception to your Honor's refusal to require the prosecution to elect.

During the course of this trial at one time counsel suggested [67] that he was abandoning all of the overt acts except the last one alleged, and furthermore, there is the objection I have heretofore made from time to time as to the propriety of the introduction in evidence of certain documentary evidence as against all of the defendants and as to the

propriety of the introduction in evidence of certain documentary evidence as against all of the defendants and as to the propriety of the admission in evidence of certain conversations that have occurred between certain of the defendants out of the presence of other of the defendants after one of the alleged overt acts had been completed. That is the basis of the motion.

Mr. Licking: I submit it.

Mr. Cannon: I assume your Honor will not require him to elect on which particular one at this time. I take exception.

Mr. McDonald: If your Honor please, I thought you were looking at me when you made that suggestion. Just for the purpose of the record, I want to join in the motions heretofore made by other counsel.

The Court: Very well.

Mr. McDonald: I except to your Honor's rulings. (839-840-841)

Each and all of the foregoing Assignments are made by Nathan Newman, W. O. Files, and Burt Cain, jointly and severally, as to each of said Assignments, and as to each of said defendants.

Wherefore, the said defendants, Nathan Newman, W. O. Files, and Burt Cain, by reason of the errors aforesaid, jointly and severally pray that the judg-

ment and the sentences against and upon them may be reversed and held for naught.

.....
Nathan Newman

.....
W. O. Files

.....
Burt Cain

CANNON & CALLISTER

By REED E. CALLISTER

FRED McDONALD

S. E. SHEFFEY

Receipt of a copy of foregoing Assignment of Errors is hereby admitted this 11th day of April, 1945.

FRANK J. HENNESSY

U. S. Attorney

Per T. S. [68]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 11th day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause]

SETTLING OF BILL OF EXCEPTIONS
CONTINUED TO MAY 1, 1945

This case came on regular this day for settling bill of exceptions. On motion of Fred. McDonald, Esq., for the defendants, and with the consent of William E. Licking, Esq., Assistant United States Attorney, it is Ordered that said matter be continued to May 1, 1945.

On motion of Mr. McDonald, it is Ordered that the defendant Nathan Newman may leave the jurisdiction of this Court, in accordance with a signed order this day filed. [69]

Receipt of a copy of Bill of Exceptions is hereby admitted this 11th day of April, 1945.

FRANK J. HENNESSY

U. S. Attorney

Per T. S. [70]

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, United States Attorney,
and William E. Licking, Assistant United States
Attorney:

Sirs:

You will please take notice that the foregoing

constitutes and is the proposed Bill of Exceptions of the defendants and appellants Nathan Newman, W. O. Files and Burt Cain, in the above entitled action, and that said defendants and appellants will ask the allowance of the same.

DAVID H. CANNON,

Attorney for said defendants
and appellants

FRED McDONALD,

Attorney for defendant and
appellant W. O. Files

S. E. SHEFFEY,

Attorney for defendant and
appellant Burt Cain

[Endorsed]: Filed April 28, 1945. [71]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that this cause came on regularly for trial on the 23rd day of January, 1945, before the Honorable Michael J. Roche, Judge of said Court, sitting without a jury, a trial by jury having been expressly waived by the plaintiff and the defendants; the following appearances were made:

Counsel appearing:

For the Government: William E. Licking, Esq.

For Defendant Malaby: J. W. Ehrlich, Esq.

For Defendant Newman: David H. Cannon, Esq.

For Defendant Lowenthal: Albert McGuire, Esq.

For Defendant Shaeffer: Leslie C. Gillen, Esq.

For Defendant Rocco: Agnes O'Brien

For Defendant Files: Fred McDonald, Esq.

For Defendant Cain: Alden Ames, Esq. and S. E. Sheffey, Esq.

Whereupon, the trial of said cause proceeded and the following proceedings were had, and testimony, oral and documentary, was offered by the respective parties, and admitted by the court.

At this point the Defendant Malaby, with the consent [72] of the Court, withdrew his plea of not guilty heretofore entered, and entered a plea of guilty, and was released on his present bond, and the defendant Rocco was, upon motion of his counsel, and without objection by the prosecution, granted a severance (2, 3).

JOSEPH NATHANSON

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

Mr. Licking: Q. Mr. Nathanson, you are an employee of the United States Government?

Mr. Cannon: I object to the introduction of any evidence on this indictment on the ground it does not state an offense. I can state it very briefly to your Honor. I know the matter was raised by de-

(Testimony of Joseph Nathanson.)

murrer, but I prepared a rather lengthy brief on the expectation of this objection. I think I can point out very briefly why this indictment does not state an offense. * * * *

The Court: For the purpose of the record, it will be denied.

Mr. Cannon: Exception. (14, 16)

(Witness continuing:)

I am in the employ of the United States Government as a price specialist in the San Francisco District Office of the Price Administration, and as such am familiar with the manner and method of arriving at the ceiling prices on various commodities such as whisky. These prices for whisky are governed under the provisions of the maximum price regulation 445 as amended, and the price at the wholesaler's level is fixed at the place of business of the wholesaler under the applicable regulation. Exhibit 1 for Identification is a certified copy of papers in the Office of Price Administration (17).

From this document and my knowledge of the manner and [73] method of price fixing, I can state the ceiling price in this district of whisky for delivery by a Los Angeles wholesaler to a retailer in this district.

Mr. Cannon: I object on the ground it is asking for testimony based upon a hearsay document as far as the defendants are concerned.

The Court: If he knows he may answer.

Mr. Cannon: Exception. (18)

(Witness continuing:)

(Testimony of Joseph Nathanson.)

The ceiling price on this particular whisky on sales by a wholesaler to a retailer is \$273.63.

Cross Examination

By Mr. Cannon:

That was the ceiling price in force from April 1944 up to the present time, and includes all Federal and State excise taxes, but not sales tax. The ceiling price on a particular brand of whisky is not published in any bulletin issued by OPA, but is fixed by the application of certain rules to the manufacturer's costs. When a retailer makes a purchase he would know what the ceiling price was from the invoice itself. As far as the retailer was concerned the invoice issued by the seller would not be the only source of information by the retailer. Under the regulation the wholesaler is required to keep his customers' records, showing how he established the price for all commodities which he sells. If any one were to determine the ceiling price of this liquor that knowledge would have to come from the wholesaler's record (21).

Redirect Examination

By Mr. Licking:

The wholesaler is required by law to apply a certain figure to his cost, and set his ceiling price thereby, and is required to register that price with the Office of Price Administration. Exhibit 1 for Identification is that registration [74] on that particular whisky with the Office of Price Administration.

Q. Well, the OPA regulation, then, sets up a formula and the different costs and other factors are applied and required to be complied with by the manufacturer, by the wholesaler, and by the retailer?

A. Correct. (21)

(Witness continuing:)

In my judgment there was a ceiling price for McHenry whisky of the type described in Exhibit 1 for Identification at \$37.63 per case of fifths (28).

Recross Examination

By Mr. Cannon:

The ceiling price that I gave a little while ago would be the price in effect on April 1, 1944 in this district. The document which you show me was sent by the Office of Price Administration in the San Francisco district to all retail off sale liquor licensees on or about May 15, 1944.

Mr. Cannon: I offer the document in evidence.

Mr. Licking: I object to it on the ground it is immaterial for any purpose and not cross-examination.

The Court: I will give him a record on it. It may be admitted and marked.

(The list was marked Defendants' Exhibit A in evidence.)

Mr. Licking: Exception. (30)

(Witness continuing:)

I do not know whether or not there was any other circular sent to any of the licensees out of the San Francisco office of the OPA on any other liquor.

CLYDE BIRD

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Clyde Bird and I am an investigator for the Office of Price Administration in the San Francisco District, [75] and as such conducted an investigation leading up to the indictment in this case. In connection with my investigation I contacted one Martin Fuchslin at 338 Third Street, San Francisco, where he did business as the Montana Club, and I obtained from him certain documents marked and offered as Exhibit 2 for Identification (33) and I interviewed Steve Vincentini and Vincenzo Gabrielli at Stockton, California. Steve operated Steve's Inn at 120 East Weber Avenue, Stockton, California, and Gabrielli is a partner of Steve in some of the operations. I secured certain documents from them or from Vincentini's attorney, which I now mark as United States Exhibit 3 for Identification.

These are photostatic copies of the originals of certain of those documents, and are true photostats, and they are now marked United States Exhibit 3-A for Identification.

I also interviewed one Frank Spenger (39) who operates the Spenger Fish Grotto at 1919 Fourth Street near Jefferson Avenue in Berkeley, and I secured from him a check and a receipt and other papers which have been marked United States Ex-

(Testimony of Clyde Bird.)

hibit 4 for Identification. I also received from Frank Spenger a check in amount of \$13,736 payable to cash, and a receipt signed by W. O. Files for that amount. They are marked Government's Exhibit 4-A for Identification.

I also interviewed one Victor Figone (40) of 455 San Pablo Avenue, El Cerrito, doing business as the Six Bells Cafe, and I obtained certain documents from him which have now been marked U. S. Exhibit 5 for Identification.

I interviewed one Guy Caputa (41) and obtained from him certain documents marked U. S. Exhibit 6 for Identification, and a photostatic copy of a receipt signed "W. O. Files" now marked U. S. Exhibit 6-A for Identification.

I interviewed Robert C. Thomason (42) at 309 San Pablo [76] Avenue, El Cerrito, doing business under the name of Hunter's Lodge, and I secured from him certain documents. They have been marked U. S. Exhibit 7 for Identification. I also received a receipt signed "Charles Malaby" and offer it as U. S. Exhibit 7-A for Identification.

I also interviewed Margaret McNeil (43) at 740 San Pablo Avenue, El Cerrito, doing business under the name of the Big Boy Barbecue, and I obtained certain documents from her which have been marked as U. S. Exhibit 8 for Identification.

I interviewed Pete de Georgis (43) at 1614 San Pablo Avenue, El Cerrito, doing business under the name of Miami Inn, and I received certain docu-

(Testimony of Clyde Bird.)

ments from him and they have been marked U. S. Exhibit 9 for Identification (46).

Mr. Licking: * * * If your Honor please, I just had a discussion with Mr. McDonald and Mr. Cannon. I have some fifteen more sets of documents which I propose to identify by this witness and to offer for identification. * * * I have some fifteen more sets of them, and I might make a blanket offer of them. Yes, I do that. * * *

The Court: Is that agreeable to all counsel?

Mr. McDonald: It is agreeable to me, your Honor.

Mr. Ames: No objection. (44, 45, 46)

(Witness continuing:)

I also interviewed the following:

Pete Reali, Central Cafe, 402 Fourteenth Street. I did not secure any documents from him; Mr. Bryden, 1620 San Pablo Avenue, El Cerrito, doing business under the name of Jungle Inn, and obtained documents from him, marked as Government's Exhibit No. 11 for Identification; also John Di Silva (46) at 1182 East Fourteenth Street, San Leandro, but got no documents from him; also Nello Nomellini and Luigi Di Ricco (47), at 4822 Mission Street, under the trade name of El Lido Bocce Ball [77] Alley, and the Bluebird Cafe, 3149 22nd Street. Ricco owns both taverns and Nomellini is the manager of the Bluebird. I obtained certain documents from them which are marked U. S. Exhibits No. 12 and 12-A for Identification.

(Testimony of Clyde Bird.)

I also interviewed Manuel Costa and Manuel Costa, Sr., (47, 48) at 9800 East Fourteenth Street, Oakland, California, and obtained documents from them which are marked U. S. Exhibit No. 13 for Identification.

I also interviewed Amaro Pitta (48) at 737 Kirkham Street, Oakland, and obtained certain document marked U. S. Exhibit 14 for Identification.

Also R. Lichtenberg and W. Johnson, doing business as Boyes Hot Springs, Sonoma County, California (48), and obtained certain documents from them marked U. S. Exhibit 15 for Identification.

Also Enrico Barotti (49) doing business as Charles Cafe in Santa Rosa, and received certain documents from him that have been marked U. S. Exhibit 16 for Identification and U. S. Exhibit 16-A for Identification.

Also Charles Ferretti in Sonoma, doing business as Charles Cafe, and obtained from him certain documents which have been marked for identification as U. S. Exhibit 17 for Identification.

Also J. Gibson and Elliot Smith (50) doing business at 1782 Seventh Street, Oakland, California, and obtained certain documents which have been marked U. S. Exhibit 18 for Identification.

Also Jack Cardinelli (50), in Richmond, but I did not get any documents from him.

Also Joseph Porfido (51) and obtained a check drawn on the Bank of America dated June 18, 1944, payable to Pete de Georgis for \$595, signed Prudence Porfido, and marked U. S. Exhibit 19 for

(Testimony of Clyde Bird.)

Identification; and I also obtained certain [78] other documents marked U. S. Exhibit 19-A for Identification.

Also John P. Kusalo, (51) at 10701 East Fourteenth Street, Oakland, doing business under the trade name of G & M Coffee Shop, and I obtained certain documents from him, which have been marked as U. S. Exhibits Nos. 20 and 20-A for Identification and 20-B for Identification.

Also Mr. Abrams from Santa Rosa. He has now gone to Seattle. This is one of the transactions that Rocco handled and I received from Abrams certain checks in the course of my investigation. These are marked U. S. Exhibit 21 for Identification (53).

Also I interviewed Charles Malaby, and obtained certain original letters of which photostats were taken, and which photostats have been marked U. S. Exhibit 22 and 22-A for Identification (54).

I received the two exhibits marked U. S. Exhibit 3-B for Identification from Mr. Charles Malaby. I also interviewed Mr. Cain and obtained a copy of his agreement with Mid-Valley Distilling Corporation (56) which has been marked as U. S. Exhibit 23 for Identification.

Cross Examination

By Mr. Ames:

I am an investigator for the Office of Price Administration, attached to the San Francisco District Office. In this case I obtained the necessary permission to go to Los Angeles to investigate the mat-

(Testimony of Clyde Bird.)

ter. I got a list of customers of Mr. Cain's from the Alcohol Tax Unit in San Francisco. I did not investigate the records of the Alcohol Tax Unit. I merely obtained a list of some people who had received liquor from the International Import Company (59). This was given to me by John Becker of the Alcohol Tax Unit.

(Witness excused.) [79]

STEVE VINCENTINI

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Steve Vincentini, and I am in the restaurant business, with a bar in connection. I have a partner by the name of Vincenzo (61). He used to be my partner, but now he just helps me out. Last year I ordered some McHenry whisky. I talked to some fellow about whisky and then I came to San Francisco and met Malaby. This fellow had given me one of his cards. I saw Malaby in San Francisco.

(At this point U. S. Exhibit No. 24, being a picture of Mr. Malaby, was offered for identification.)

(Witness continuing:)

I had a discussion with him about whisky.

Q. What did he say and what did you say?

Mr. Ames: I object to that. I will have to ob-

(Testimony of Steve Vincentini.)

ject, your Honor, on the ground it is incompetent, irrelevant and immaterial. (64) * * *

Mr. Cannon: I just want to add a ground to the objection suggested by Judge Ames. The further objection is that it is hearsay as to all the defendants in this case. (65) * * *

The Court: I will allow it subject to a motion to strike and over the objection of all the counsel.

Mr. Cannon: Exception. (65)

(Witness continuing:)

He had me taste the McHenry whisky. I ordered 75 cases; 50 cases 100 proof, and 25 cases 85 proof. I gave him the money, and he took me to a real estate office of Files and Shaeffer (66) who are now in court. Shaeffer, Files, Malaby, myself, and Gabrielli, were in the office when I told Malaby I wanted to put my money in escrow, and when I received my whisky [80] I would give the rest of the dough.

Mr. Cannon: I assume your Honor does not care to have us repeating objections. We understand the objection heretofore made to hearsay testimony applies also to any conversation which this witness may have had with the defendants Files and Shaeffer, as far as my client is concerned.

The Court: All right.

Mr. Cannon: Exception to the ruling. (67)

(Witness continuing:)

I put up \$2690 and he gave me a note for it and I went out. Malaby told me I would receive the

(Testimony of Steve Vincentini.)

whisky in 60 days. Files and Shaeffer were there. The money I paid was not for the full price of the whisky. It was paid just to be sure I was going to get the whisky. The photostatic copy of the order slip has my signature on it, and shows a total price of \$2,237 for 50 cases of McHenry, and 25 cases of another kind of McHenry (69). At that time I got the receipt signed by Mr. Malaby, and which is marked Exhibit 3-A for Identification, and which is for \$2,100, dated April 20, 1944, which is the day I went down to the office. The money was turned over to Malaby or Files or Shaeffer. All three were in the office and Files gave me the receipt, which says: "Received \$2,100 deposited with W. O. Files, 309 Kearny Street, for certain transaction." * * * "If not completed within 60 days to be refunded."

(At this point photostat copy of purported purchase order to the International Import Company was marked as U. S. Exhibit 3-C for Identification.)

(Witness continuing:)

Some of the whisky was \$35 a case, and some \$48 a case. Referring to Government's Exhibit 3-C for Identification it sets out the money that I was supposed to pay when I got my whisky. [81] The \$2,500 I paid in the first place was a payment over and above this other price. Afterwards I got 25 cases of whisky which was the low priced whisky, I think, and I paid for it by certified check for \$926.05 (73-A). I later got 25 cases but could not use it

(Testimony of Steve Vincentini.)

and I sent it back to the company. After my correspondence with the International Import Company I made a further effort to get my money back, and turned the case over to my lawyer. I saw Mr. Files and Mr. Shaeffer afterward and had a conversation with them, which was two days before the note was given to me. Gabrielli was with me. I had a conversation.

Q. At the time you had your conversation with Mr. Files and Mr. Shaeffer when Gabrielli was there, what was said, do you remember?

Mr. Ames: I make the objection the conversation would be hearsay as far as the defendant Cain is concerned, and not competent evidence to prove the crime alleged in the indictment.

Mr. Licking: This is a conversation which I will introduce, and I intend to connect it up to the satisfaction of the Court to show that it is a statement made by conspirators during the course of the conspiracy, or to cover up the existence of a conspiracy.

The Court: Overruled.

Mr. Ames: Exception, your Honor, on behalf of the defendant Cain and all the defendants. (77-78)
(Witness continuing:)

He says, "You got to give me time until tomorrow." I then left Gabrielli in San Francisco and I went back home, and afterwards I got a note signed by Files and Shaeffer, Exhibit 3-A is that note, for \$3,668, which is the full amount that I put in. [82]

(Testimony of Steve Vincentini.)

Mr. Gillen: I move the question and the answer be stricken as having absolutely no bearing on the proof of the charge set forth in the indictment.

Mr. McDonald: I join in the objection.

Mr. Ames: I join in the objection, and also that it is incompetent, irrelevant and immaterial.

The Court: Overruled. Let the question and answer stand.

Mr. Ames: Exception. (79)

(Witness continuing:)

Exhibit 3-A for Identification is a correct copy of the receipt that I got from Mr. Files. The original of these documents and the correspondence I had with the International Import Company are with my attorney.

Cross Examination

By Mr. McDonald:

I first found out about this transaction in whisky from some gentleman now in France. This man gave me a card that had Malaby's address on it, and he told me to go there and I could buy whisky from him. I saw Malaby and discussed the purchase of whisky with him in his apartment at 805 Bush Street, Apartment 314. I told him how much whisky I wanted, and he told me how much whisky he would be able to get me, and we discussed the price, and then I left the apartment and went down to the office on Kearny Street. I had completed my deal with Malaby when I left the apartment,

(Testimony of Steve Vincentini.)

and I went down and deposited \$2,100. While in the apartment we fixed up the amount of the whisky, and what it would cost, when I was going to receive it, and what I was to pay, but I did not want to give the money to him, as I wanted to put it in escrow.

Cross Examination

By Mr. Gillen:

When I went down to the office on Kearny Street with Malaby, Gabrielli was with me and another friend from Stockton, and Files and Shaeffer. It is not a fact that the first time I saw [83] Shaeffer was the day that I was there demanding a note. I saw him before, when I made the deal for the whisky. That was the first time I saw him. (83) The second time I went down to 309 Kearny Street was about 60 days after that, or the day before the 60 days, because I had not received any whisky. Files and Shaeffer were both there then. I came with my partner, Gabrielli, and another fellow from Stockton. I was angry. I wanted my money back because I did not get the whisky (84). We had our coats off. I talked to Mr. Files alone. Mr. Shaeffer was in the office. I told him if I did not get the money from then I would get the law. It is not a fact that when I went there I threatened Mr. Files while he was alone. I am sure Shaeffer was there. I did not go back myself the next day. I went to Stockton, and left my partner, Gabrielli, in San Francisco

(Testimony of Steve Vincentini.)

that day. I never saw Files and Shaeffer any other time. My partner came back with the note and said that he would not give the money but gave a note.

Redirect Examination

By Mr. Licking:

The first time I went to the office with Malaby the money was turned over in escrow, when Malaby, Files, and Shaeffer were there. I gave the money in cash and said, "This is supposed to be for some whisky deal. I want you to keep the money for this boy for sixty days." (86) When I went down with Malaby I had not already given him the money. I gave the money to Files. Files wrote the receipt himself. I was supposed to get 50 cases of 100-proof whisky, and 25 cases of 85-proof, in sixty days, and that was explained at that time to Files and Shaeffer, I am sure.

Recross Examination

By Mr. McDonald:

I am sure that the amount of whisky I was to get was discussed in the office; it was discussed before I go to the real estate office (87). I had the order when I went to the office. [84] Mr. Files made out the receipt. I gave him the money. The first receipt was given to me by Malaby and the other receipt was given to me by Files. Both of them were given to me in the office.

(Witness excused.)

VINCENTO GABRIELLI

a witness for the Government, being duly sworn, testified:

My name is Vincenzo Gabrielli, and I live at 1421 North Stanislaus, Stockton. I have done nothing since last year when I got hurt. Before that I was a molder and working on a newspaper. I was also in the restaurant and bar business in 1939 with Steve Vincentini whom I have known since 1924 or 1925. Occasionally I help Steve out, once in a while. I made two trips to San Francisco with him. The first time he came to make a deal on some whisky. I went with Steve to Mr. Malaby's apartment on Bush Street. Steve and Malaby talked and I am not sure whether any papers were made then or not. I only heard part of what was said. I do not remember the date. I do not remember how much was to be paid a case. I saw the money paid over to Malaby. I guess it was \$2100 or \$2200. It was for whisky. I do not know what the understanding was between Steve and Malaby. Steve and Malaby left me in the lobby of the apartment house and were gone about half to three-quarters of an hour and came back and we got in the car and went back to Stockton. Later Vincentini received some of the whisky which was stopped by the State as unfit for human consumption (93), so in 59 days after my first trip, I and a young man from Stockton came down with Vincentini to try to get the money back, and we went

(Testimony of Vincenzo Gabrielli.)

to the office of Shaeffer and Files, whom I had never seen before. They are both in the courtroom now. Vincentini tried to get the money back. None of us were mad; and none of us had our coats off. When we first came in [85] Vincentini spoke first to Files. I have Vincentini's receipt given to him by Files covering the money put in escrow (96). Government's Exhibit 3-A for Identification looks like that paper. It reads: "April 20, 1944. Received from Steve Vincentini, \$2,100 deposit on transaction, 60 days to complete. W. O. Files" (96). Steve said he came down to get his money back because the sixty days was over and he said he had received 25 cases of whisky which were worthless and the State had confiscated it. Files said he couldn't give him the money that day, because the money was deposited in the safety deposit box, and another man, Newman, had a key; that Files had one and the other man had another key. He promised to get the money the next day, and telephoned to Los Angeles. I was there when he telephoned long distance, and I believe he asked for Cain, if I don't mistake the name. I do not remember whether I heard the conversation. We were supposed to get the money the next day, so Vincentini told me to stay in San Francisco and he would go back to his place of business. The next day I went there alone, and after a few seconds, Vincentini sent the other man down to look out for me, to assist me in requesting the money back. Files was in the office. It was 2 o'clock.

(Testimony of Vincenzo Gabrielli.)

Shaeffer was there and I talked plenty with him. Newman was not there. I said I either wanted the money or wanted security or I would call a friend of mine who was an attorney, and they tried to scare me with publicity. I told them I didn't worry, that I had been with a newspaper for thirteen years, and I knew all about publicity. I couldn't get anything. Files asked me if I wanted to talk to this man in New York at the Waldorf Astoria (102), and I told him was not interested, and finally told the man that was with me that we would go, and Shaeffer came out and said that they would give me a note. Government's Exhibit 3-A for Identification is a photostat copy of the note [86] that I was given at that time.

Cross Examination

By Mr. McDonald:

I went up to the apartment with Steve Vincentini and saw Steve give Malaby \$2100. I was not angry when I went to Mr. Files' office with Vincentini and this man Fred. I insisted on getting either the money or security for the sale.

Cross Examination

By Mr. Gillen:

I was interested in getting the money back, and I went there 59 days from the date of the receipt, and Steve said that tomorrow would be 60 days and that the deal would not go through. He had received about 25 cases which the State had confiscated, and he wanted his money back. When I

(Testimony of Vincenzo Gabrielli.)

worked on a newspaper in Stockton I solicited advertising, and I told Files and Shaeffer that I was with a newspaper in Stockton, but I did not tell them that I would give them very bad publicity, but told them I was not scared of publicity. I did not hear Vincentini mention any threat. I made none and neither did Fred. I told them I was going to see an attorney. The first day I was there Files placed a call to Los Angeles, in my presence, and talked to some person over the phone, but that talk did not interest me and I did not pay any attention to what was said. I do not know that he was connected with Los Angeles. The next day when I was there in Files' office he told me he had put in a call to New York, but I was not there when he did it.

Redirect Examination

By Mr. Licking:

Files phoned Los Angeles, and he said he had talked to Cain in Los Angeles, and that Mr. Newman was in San Diego and would not be back until tomorrow at 2 o'clock; but that when he came back they would wire the money, and said if I did not believe it I could talk to Williams. I told him I did not know Williams, I did not know Cain, and I did not know Newman.

(Witness excused.) [87]

WILLIAM S. JOHNSON,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

I run the Boyes Springs resort (112). My partner is Rudolph Lichtenberg. I know Rocco but I do not know any of the men now on trial. I never met Malaby until this morning. Rocco is the only one I have met. I testified before the Grand Jury. In 1944 I purchased, or agreed to purchase, some McHenry whisky, and first negotiated with Rocco. This was last year, in the Spring. I imagine in March. I met Rocco in Santa Rosa, and I discussed with him the possibility of getting some whisky.

Q. What was said by him?

Mr. Cannon: I make a general objection on behalf of all the defendants to this conversation, and to whatever questions that may be gone into on the examination with respect to this conversation had out of the presence of any of the defendants, on the ground it is hearsay.

The Court: Overruled. I will allow it under the same ruling.

Mr. Cannon: Exception.

The Court: It is going in subject to your motion to strike and over your objection. Unless it is connected up——

Mr. Cannon: I may have the exception to the whole line of testimony, your Honor?

(Testimony of William S. Johnson.)

The Court: Yes. (114-115)

(Witness continuing:)

I told him I had heard there was a possibility of getting some whisky, which we needed badly, and asked him if he knew anything about it. He told me he did and knew of a connection where it might be possible to get some. He had a little sample there, labeled "McHenry" Blended. I tasted it. It was not too [88] bad. He said he wanted a deposit down and the balance would have to be paid by certified check (116). He said an invoice would be given covering the balance but the first money I would have to give him in cash. I did not know what the ceiling price of the whisky was at that time, and he said the remaining money to be paid on the whisky would be paid by an invoice coming through from the company that was going to deliver the whisky. He said the whisky would be \$57.50 a case, plus the freight. At that time I did not sign anything but I gave him \$1030 as a down payment on 50 cases, and I later received 50 cases. Refreshing my recollection from Government's Exhibit No. 15 for Identification, I would say that we paid P.M.T. \$1839. Before I received the merchandise and after my discussion with Rocco, and after my deposit of the money with him, I did not have any conversation with any one else about it. I got no receipt from Rocco for the \$1030.

(Witness excused.)

RUDOLPH LICHTENBERG,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Rudolph Lichtenberg, and I am a partner with William Johnson in the Boyes Springs resort. In the Spring of last year I had a transaction for the purchase of some McHenry whisky. In that connection I met Rocco, Malaby and Newman. I would not know Newman because I saw him just a moment. Malaby is the one I did business with, and he introduced me to Newman, but I do not know Newman's first name. Rocco brought Malaby down. I could not say whether the Newman now on trial is the man introduced to me or not. When they came down it was the latter part of May, I believe. The papers that were presented to me when Rocco came down were an invoice covering 50 cases of McHenry, fifths, at a unit price of \$30.07, total of \$1809.50 [89] (122) and the second is a receipt for money for merchandise to be delivered, the balance due being \$1809.50. Later we received the whisky and paid for it. It came by truck and we paid some \$30 for freight and a second check for \$1834 and something. The State Board of Health confiscated the whisky and we shipped it back to Los Angeles to the Terminal Warehouse.

(Witness excused.)

CHARLES FERRETTI,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Charles Ferretti, and I live in Sonoma (125) where I have a liquor store and tavern. I operate Charlie's Place. I know Primo Rocco. I have known him three or four months. In connection with McHenry whisky, I first learned of it from Johnson of Boyes Springs, who said he was going to Santa Rosa to see if he could get some whisky, and asked me if I wanted to ride with him. I did and went to Rocco's tavern. Johnson introduced me to Rocco and he talked with him first, but I did not hear that conversation.

Q. Do you recall what you said to Mr. Rocco and what he said to you?

A. When Mr. Johnson was finished he called me over there——

Mr. Cannon: Your Honor, I offer an objection at this time on behalf of all the defendants to this conversation, and to questions that may be asked of this witness along the same line with respect to conversations on the ground it is hearsay and has no value in the case as against any of these defendants. In anticipation of your Honor's ruling I will take an exception to it, and may I have an understanding the objection and exception runs to the entire line of testimony?

(Testimony of Charles Ferretti.)

The Court: Yes. Objection overruled. (126-127) [90]

Rocco asked if I was interested in buying some whisky and I told him I was, and he told me he could get me some of McHenry Blended, which would cost about \$50 a case all told, and he told me to give him \$500 and when the liquor came I would have to pay the balance, whatever the bill was (127). That was for 25 cases. There was no discussion as to the OPA or ceiling price, but he said to give him \$500 and he would get me 25 cases of whisky and then I could pay the balance when it comes COD. Later I received the whisky. A few days later at Boyes Springs I met a man I think was Malaby who wanted me to sign a release on the whisky warehouse receipt, or something. The papers in Government's Exhibit 17 for Identification are the papers I mean; and the signature, Charles Ferretti, on the second and last of those papers, is my signature. Later I received the whisky, paid COD for it, amounting to \$900 plus. I had to pay the freight besides the amount set out in the customer's copy of the invoice.

(Witness excused.)

ENRICO BARROTTI,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Enrico Barrotti, and I operate a tavern in Petaluma, at 41 East Washington Street. During the Spring of last year I purchased, or agreed to purchase, some McHenry whisky. I first talked with Primo Rocco who I met in the Center Club (130). He asked me if I wanted some whisky, and he had a sample. Ira Burnett was also there (131).

Q. What did Rocco say when he introduced you to Burnett?

Mr. Cannon: If the Court please——

Mr. Licking: I will stipulate, if the Court please, that the same objection heretofore made by counsel is interposed to this and the Court has made the same ruling. [91]

Mr. Cannon: It is hearsay as to these defendants and we will take an exception to the ruling, and the understanding is that we have a running objection and running exception to the testimony.

The Court: Let the record so show. (132)
(Witness continuing:)

Both Rocco and Burnett said they could get whisky, but I do not know who had the sample. The price was discussed of \$57 a case. Rocco said that he had a carload come and he would like to sell about 100 cases more or less. I contracted for

(Testimony of Enrico Barrotti.)

200 cases at \$57 a case and paid down \$4220 to Rocco; and he gave me a receipt for it, which is Government's Exhibit 16-A for Identification. It reads, "May 17, 1944. Received from Enrico Barrotti \$4120. P. L. Rocco." (134) I signed Government's Exhibit 16 for Identification before I got the whisky. I signed them at my place, when Rocco and Burnett were there, and Malaby who signed under the printing, "International Import Company." Later they brought 50 cases and wanted \$30 more so I refused to accept it. They had already unloaded the whisky but when I refused to take it they loaded it up again and drove off.

(Witness excused.)

MARTIN FUCHSLIN,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Martin Fuchslin, and I am a hotel and tavern keeper at 338 Third Street, in San Francisco. Early last year I purchased or agreed to purchase some McHenry whisky. I do not know the man I first met, but I saw him out in the hallway with an overcoat on, but I do not see him in court. I met him in a tavern on Kearny Street.

(Witness withdrawn.) [92]

FRANK SPENGER,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Frank Spenger, and my place of business is 1919 Fourth Street, Berkeley. Early last year I entered into an agreement to purchase some McHenry whisky, and first contacted Mr. Malaby whom I had met a couple of times in my place of business. Mr. Benson introduced him to me. About that time almost every one was short of whisky. I believe this was in April. I signed some papers at the time of making the deal. When Benson came to my place with Malaby, Benson stayed outside, while Malaby and I talked in the office. It was about a week or ten days after that that I signed the papers (143).

Q. About a week, you say, before you signed the first of the papers you after signed in the transaction; what was your conversation?

Mr. Cannon: If your Honor please, I object on behalf of all the defendants except Mr. Malaby. I make the objection jointly and severally, and anticipating your Honor's ruling I would like to take an exception to an adverse ruling. I object on the ground it is hearsay as to the other defendants. If it is agreeable with your Honor I would like to have the objection running throughout the conversation as between this witness and any other person out of the presence of any of these defendants. I take an exception to the ruling.

(Testimony of Frank Spenger.)

The Court: The objection will be overruled. I think I have indicated clearly, I attempted to, that unless it is connected up it will go out.

Mr. Cannon: I understand that. I am afraid, though, if we ever have to go to a circuit court that the circuit court may not understand the force of my objection. [93]

The Court: I think under the new rules even an exception need not be taken. (144)

(Witness continuing:)

Malaby had a sample with him and it tasted good, and he said that that was the whisky that he proposed to sell me. He said it was McHenry Blended, and the price was \$60 for the blend and \$70 for the bonded. He did not extend me credit for the whisky. There was an overage of so much a case. I think the OPA price was around \$26 or \$27 for the blend and \$30 some odd for the bond. I ordered 500 cases, and at that time signed a yellow order sheet, shown as Government's Exhibit No. 4 for Identification. The second of these papers bears my signature and is a receipt for money or merchandise to be delivered; and the third, which is a delivery receipt, dated May 23rd, also bears my signature. Between our first conversation and later, he came over several times. The certified check debit for \$1809.50 is for 50 cases which were delivered (147). We discussed how the over-the-ceiling price was to be paid, and we decided we were to go to San Francisco and put that in escrow for 90

(Testimony of Frank Spenger.)

days until we got our whisky. I went over to San Francisco with Malaby and Benson, about a week after our first conversation. In San Francisco we went to Files' office. Files was there but Benson did not go in. Shaeffer walked in, after the deal was over. Government's Exhibit 4-A for Identification shows my check that I drew then and which I handed over to Files. He filled it out and I signed it. Malaby and I had figured out the amount the check was to be and Malaby gave Files the directions. There was no discussion at all in Files' office as to the transaction that Malaby and I had made. Since the deal being made was illegal we had been talking about what I would show I was paying this money for, and it was suggested that I was making a deposit on an apartment house or it was to [94] look like that. I had had my conversation already with Malaby and we just put the money up there in Files' office as security to pay for my liquor. There was very little said to Files. Files did not talk much about it. It was all right; the thing was all right; and I did not have to worry about that. Exhibit 4-A is the receipt Files gave me for the check (152). The check was cashed on April 26, 1944. Later I received 50 cases of Blend whisky and started to use it in my place but got so many kicks on it that I stopped serving it. I tried it myself and it did not compare favorably with the sample that I had tried. The Pure Food came along and condemned it all and I left it in my warehouse, but later they came and took

(Testimony of Frank Spenger.)

it away to some express company. It was sent back to the firm from whom we got it.

Mr. Ames: Has your Honor ruled on the objection of Mr. Cannon that this is all immaterial? I would like to have your Honor's ruling. The objection to all this testimony with reference to what became of the whisky afterward; it is quite immaterial and serves to prove no facts alleged in the indictment. The objection is in behalf of all the defendants.

Mr. Licking: I am attempting to prove, your Honor, the whisky went back to the International Import Company, where it came from. That is all.

The Court: For that purpose I will allow it; for that limited purpose. Proceed.

The Witness: It went back to the National Import Company. (155)

Cross Examination

By Mr. Cannon:

I knew from the very first time I worked out these negotiations with Malaby that I was violating the law, and all the way through I intended to violate the law, and gave my check for that purpose.

Cross Examination

By Mr. Ames:

On the original order which I gave there were 200 cases of blend, 200 cases of whisky, straight bourbon and a hundred cases of rye. The last two are bonded. Malaby said he was able to deliver

(Testimony of Frank Spenger.)

them and that he would give me all of the whisky I wanted.

Cross Examination

By Mr. McDonald:

I met Malaby and Benson in my place of business in Berkeley and had a conversation with Malaby in regard to the purchase of whisky (156) and the price was then agreed upon. I knew the amount of money I was to deposit and agreed to all of that in Berkeley. I came over to San Francisco about April 24 and took my check there, and went to Files' office where the check for \$13,736 was made out and I signed it, and received a receipt for it. Very little, if any, discussion was held in Files' office.

Cross Examination

By Mr. McGuire:

I never did see or have any transactions with Lowenthal. I do not even know him.

Redirect Examination

By Mr. Licking:

Malaby came to my place eight or nine times altogether. The day the order was written up he had Mr. Newman with him. When Newman was there, there was no discussion about any overage. That had already been discussed with Mr. Malaby. When Malaby introduced Newman to me he said that Newman was his associate. I believe Newman came to my home one night, a day or two before

(Testimony of Frank Spenger.)

we made the transaction, but at that time there was no discussion of any deal or overage payment.

Recross Examination

By Mr. Cannon:

I believe Malaby introduced me to Newman as being his brother-in-law, but he said that Newman was his associate. The \$1809.50 paid by certified check was figured on the basis of [96] the ceiling price of the whisky. The only discussion that was had with Newman was concerning the ceiling price and not about any overage.

Further Redirect Examination

By Mr. Licking:

In Mr. Files' office I just turned the check over to him and there was very little—practically nothing—said about it. But in that office I brought up the subject myself and said, “What can I say this money is for, for my books?” And I said, “Couldn't you put it down as a deposit on an apartment house, or something? I cannot put it down on my books as overage for whisky.” It was after that statement that Files gave me the receipt, shown as Government's Exhibit 4-A.

Further Cross Examination

By Mr. McDonald:

That discussion was with Malaby and Files. It was my intention that I would receive this whisky within 90 days. I had no discussion about the transaction with Shaeffer at all. Shaeffer came

(Testimony of Frank Spenger.)

in the office after it was settled and after I had received the receipt, and was introduced to me then, but he was not identified with the transaction.

(Witness excused.)

MARTIN FUCHSLIN,

a witness previously called for the Government,
testified:

Direct Examination

By Mr. Licking:

I have identified John McKinnon. About two weeks after I met him I turned over some money in escrow, but I had not signed up any papers before I put that money in escrow. I got a receipt for that money but Newman tore it up.

Q. Is Mr. Newman here? A. Yes.

Q. Point him out.

A. That is the gentleman over there.

Mr. Cannon: Stand up, Mr. Newman. Is that the man?

The Witness: No; the other fellow next to him.

Mr. Cannon: Next man to him. The record will show that [97] Mr. Newman stood up and he is not the man.

Mr. Licking: Well, walk down and point out the man that tore up the receipt.

The Witness: The heavy fellow, there.

Mr. Licking: Who tore up the receipt. Let the

(Testimony of Martin Fuchslin.)

record show the witness has identified Mr. Shaeffer as the one who tore up the receipt. (165)

(Witness continuing:)

Government's Exhibit 2 for Identification, the green order blank, dated May 9, bears my signature. The check I drew for the whisky was on May 24. About a month before that I talked with McKinnon in the William Tell Hotel on Kearny Street.

Q. What was your conversation with Mr. McKinnon? (167) * * *

Mr. Cannon: It is hearsay as to these defendants; it does not prove or tend to prove any issue.

Mr. Licking: That is the same objection you have to all the similar testimony that has been introduced.

Mr. Cannon: Yes.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection?

The Court: Unless it is connected up it will go out. (168)

(Witness continuing:)

We were talking about the whisky shortage and he said he knew where we could get some at about \$57 a case including everything.

Q. * * * * Was there any discussion at that time about the ceiling price or OPA price?

A. Well, I knew it was over the ceiling price.

Q. You knew it was over the ceiling price?

A. Yes.

(Testimony of Martin Fuchslin.)

Mr. Cannon: I move to strike it out as immaterial.

Mr. Licking: If he knew it merely of his own knowledge,—if [98] he knew if from the conversation.

Mr. Cannon: I move it be stricken out.

The Court: What is your objection?

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these purchasers, himself, became pro tanto a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whisky became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser.

Mr. Cannon: I think I have made my objection clear to the court. I will take a ruling.

The Court: Objection overruled.

Mr. Cannon: Exception. (169-170).

(Witness continuing:)

(Testimony of Martin Fuchslin.)

McKinnon said, "You pay so much down, over a thousand dollars in escrow and the rest when you get the money" (whisky). There was no discussion at that time as to whether or not the rest was the ceiling or OPA price. I met Mr. Files in the real estate office on Kearny Street. I went there myself and McKinnon waited for me on the corner. He had told me to ask for Files, who made out the receipt; and there was another fellow in the back but I did not pay much attention to him. Files' name was on the receipt. I gave him \$1200, as I recall. [99] I had not signed anything up to that time. I had ordered 50 cases of McHenry whisky from McKinnon. The money I deposited, over \$1000, was in cash (173). After that I did not meet any one until I paid the \$1800, at which time I must have signed some documents. I signed these papers, Government's Exhibit 2 for Identification, when I paid over the check for \$1800, and at that time the man that I identified as Shaeffer tore up the receipts. That was at my bar in my place.

Cross Examination

By Mr. McDonald:

I can identify the gentleman I met on Kearny Street if I can see him.

Cross Examination

By Mr. McGuire:

I do not think I have ever seen Lowenthal before (174).

(Testimony of Martin Fuchslin.)

Cross Examination

By Mr. Gillen:

My place of business is at 338 Third Street, San Francisco.

Q. What was the date you said you met Mr. Malaby?

A. I couldn't tell you the date, that is so damn long ago.

Q. Well, you had given a check for \$1800 on that date? A. Yes.

Q. To whom did you give the check?

A. The check to the fellow next to him.

Q. You gave the check to the fellow next to me?

A. That fellow over there. That's him, that fellow next to Malaby.

Q. Where is Mr. Malaby?

A. Right there, in back of you.

Q. Go down and point to Mr. Malaby.

A. Right here.

Q. This man, here?

The Court: Go down there.

Mr. Gillen: This man, here?

The Witness: This man, here, and he took the check.

Mr. Gillen: This man took the check?

The Witness: This gentleman took the check.

Mr. Gillen: This is Mr. Malaby. [100]

The Court: Just a moment. Let's get this record straight. He is pointing to whom?

Mr. Gillen: I was going to identify him in a moment, your Honor. 175) * * *

(Testimony of Martin Fuchslin.)

Mr. Gillen: Is this the man you recognize as Mr. Malaby?

A. That is the man I know was talking.

Mr. Gillen: Let the record show he points to the defendant Files.

Q. Did he introduce himself as Mr. Malaby?

A. He did not, but I seen a picture of him.

Q. Who showed you the picture of Mr. Malaby?

A. Well, I seen it out here in the place.

Q. Mr. Licking showed you the picture; isn't that correct? The United States Attorney, here, he showed you the picture of Mr. Malaby? I see. That is what you assumed, it was Mr. Malaby, the man at the end.

The Court: Just a moment. Let him step forward. Identify him.

Mr. Gillen: The man at the end. Do you think that is Mr. Malaby?

A. No. I guess I made a mistake.

Q. You think you made a mistake. Do you know who that man is? A. Yes.

The Court: Point to him. (176) * * *

The Court: Gentlemen, I want this record clear.

Mr. Gillen: I am going to do that, but I would like to have the opportunity of testing this man's ability to identify people before I indicate who he is pointing to. The record will show he pointed to him—that is, the witness pointed to Mr. Lowenthal first, identifying him as Mr. Malaby, and now saying that he may have been mistaken about that.

(Testimony of Martin Fuchslin.)

Q. Do you know who this man is, whom I am pointing to——

A. I seen him before, but I don't know him by name. [101]

Mr. Gillen: Let the record show we are still indicating Mr. Lowenthal. (177) * * *

Q. How many times did you meet this man I am pointing to now, and I will identify the man in a moment for the record. How many times did you meet him? A. I guess I met him once or twice when I gave him the check.

Q. You met him once in your place of business on Third Street when you gave him the check?

A. Yes.

Q. Why did you say that he was Mr. Newman—and I am indicating the defendant Shaeffer?

A. Well, you get mixed up in names, but I never forget faces. (178) * * *

Mr. Gillen: * * * Mr. Newman was asked to stand up. He could not identify him, but he did identify Mr. Shaeffer as the man who came along with Mr. Malaby.

Mr. Cannon: That's right. (179) * * *

Q. What gave you the impression that the man that Mr. Malaby brought to your place of business was Mr. Newman? A. I don't know. (179)

(Witness withdrawn.)

VICTOR FIGONE,

a witness for the government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

I am in business at 455 San Pablo Avenue, El Cerrito. (184) I have a saloon business and restaurant. I had a business transaction on McHenry whisky in the early part of last year and first contacted Malaby and Newman. Malaby came to my saloon and I bought some whisky, or ordered some, from him. I met Malaby first. Malaby said he had liquor from the International Import and I gave him an order for 50 cases. Government's Exhibit 5 for Identification is a receipt for money for merchandise to be delivered, and I signed it then. Newman and Malaby were together. I made the check out and handed it to Malaby. I got [102] a receipt for the order. The document shows the payment of \$1809.50 for 50 cases of McHenry Reserve whisky at \$30.07 a case. (186) The next morning they were back, both Malaby and Newman, and I gave them the balance in currency. Malaby told me the whisky would be \$60 a case altogether. I gave him the balance of around \$1100 in cash. There was a discussion between Malaby and me about the OPA price. He said that price of the OPA was \$30 and something. Malaby had walked into my place first, and then Newman came in, and he was sitting there while we were discussing the matter of the OPA price

(Testimony of Victor Figone.)

and the overage payments. I was about two or three feet away. The next day I paid the overage in cash because they wanted it in cash. Malaby told me that he would want that in currency, the balance; but I got no receipt for it. Newman was there when the money was paid over, but I do not recollect that he was looking on because I was busy.

Cross Examination

By Mr. McGuire:

I never saw, nor did I have any conversation with Lowenthal in connection with the transaction.

(Witness excused)

GUY CAPUTA,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

I am a tavern owner, at 1637 Broadway, Oakland, and have been in business since 1936. The early part of last year I agreed to buy some McHenry whisky. This was in February. Malaby came alone, the first time, and I had a conversation with him; and later, I paid over some money to him after he had told me the price. After I had first talked with Malaby it was two weeks before he came again, and I got a receipt for the money that I put up. Government's Exhibit 6-A for Identification is a copy of that receipt. I gave Mr. Files the money on

(Testimony of Guy Caputa.)

March 27. No one was present when I was first talking [103] with Malaby.

Q. What did he say and what did you say?

Mr. Cannon: At this time I object on the ground it is hearsay as far as all the other defendants are concerned, and I object to the testimony on that ground.

The Court: Overruled.

Mr. Cannon: Exception, and I reserve a motion to strike at a later period in the event it is not connected up.

The Court: Very well

Mr. Cannon: Exception to your Honor's ruling.
(190-191) (Witness continuing:)

Malaby said he wanted to sell some whisky and he gave me a sample, which tasted good. He said it was McHenry's, and showed me a label, and told me first the price would be \$31.20; and \$6.20 for tax. After I gave him the money he came back again and raised it. This was one week later, and he came alone. I told him I wanted my money back because I did not like the deal. I agreed to buy 500 cases, and I signed a receipt for an order. The first time that I talked with Malaby he told me that I would have to pay the ceiling price of \$36 plus more. At the time I paid him the money I got Government's Exhibit 6-A for Identification which is a receipt stating, "Received of Guy Caputa \$12,350 as a deposit on an investment." (194) When I signed this I had already put the money, \$12,000, down,

(Testimony of Guy Caputa.)

and signed this receipt for 500 cases of McHenry's Reserve but I had already begun to want my money back by the time I signed this, which shows that the price was to be \$18,200 with the notation, "No cash down." (195) I got this receipt when I gave the money to Mr. Files on Kearny Street. I went to Files' office alone. Malaby told me to go there and deposit the money down (198). Before that time I had not seen Newman. I saw him in the office of Files. I got this receipt on March 27. [104] Files was in the office and so was Newman, and so was Malaby. At that time I had no discussions but just paid over the money. Malaby said, "Files is a nice man and he guaranteed the money." I turned over \$12,000 to Files. He didn't say a word. He gave me a receipt. I paid the money after Malaby told me to pay it in check or cash, that either was all right, but just to give it to Files (201). I deposited \$12,360 and got a receipt for it and afterwards I signed Government's Exhibit 6 for Identification for 500 cases of McHenry blended whisky. It was to cost \$58 a case. When I received the whisky I was to pay Mr. Files according to the talk that I had with Malaby. When I paid the money to Files, Malaby and Newman were there. There was no discussion in the office when I paid that money. Malaby told me to pay it and he told me to pay the balance when the whisky was delivered. Newman visited my place of business again after that, with Malaby. At that time I wanted my money back and talked it over with Newman and Malaby, and they said that

(Testimony of Guy Caputa.)

the next month they would give me \$5,000; and they did, in two instalments of \$2,500 each; that is, Files paid me back this \$5,000, I think in September or October of last year.

(Witness excused.)

ROBERT C. THOMASON,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My place of business is at 309 San Pablo Avenue, El Cerrito, and I run a bar there. I purchased, or agreed to purchase a certain amount of McHenry whisky early last year through Mr. Lowenthal, who is in the courtroom. I met him in a bar in San Francisco and he told me he thought there was a man who could fix me up on whisky. I met Lowenthal again the next day, and he took me down to see Malaby (206) and at that time I signed [105] certain papers that embrace Government's Exhibit 7 for Identification; rather, my ex-wife executed them. I was out of town, the bill was brought to the house, and she gave him a check for it, when the whisky was delivered. When I first saw Lowenthal and talked with him about it, it was so long a time before the whisky was delivered that I thought it would not be delivered. It was four or five months after I talked with Malaby that I got the liquor.

(Testimony of Robert C. Thomason.)

Malaby gave me a receipt the day I gave him the money, and I gave the receipt to Mr. Bird. It was dated April 4 and is shown here as Government's Exhibit 7-A for Identification.

Mr. Cannon: If your Honor please, at this time counsel and I have agreed upon the following stipulation, and that is, on all of the conversations that are being elicited from any witness which conversations are out of the presence of certain of the defendants, it will be deemed for the purpose of the record that those defendants were absent when the conversation was held, and I object to the testimony on the ground that it is hearsay and reserve a motion to strike it in the event at a later time it is not connected up.

Mr. Licking: I am perfectly willing if the Court is that that objection may be deemed taken to all conversations which I am eliciting.

The Court: Very well. (208)

(Witness continuing)

Lowenthal asked me how much liquor I could use, and I told him 100 cases. He gave me a price, I think around \$57.50 a case, but there was no discussion then as to how it was to be paid. I was to meet him the next day, which I did, and he took me to see Malaby at the office of W. O. Files on Kearny Street. I do not know whether Files was there. I was not introduced to him. There was another man there and a [106] couple of ladies, as near as I can remember, but I do not remember the man's name.

(Testimony of Robert C. Thomason.)

Lowenthal and Malaby had a conversation, on April 4. Malaby asked me how many cases I would take and I told him 100, and he said, "That is cash," and he said he would have to have some money down to start with, and I was to pay the rest of it when the shipment was delivered, at the invoice price (209), which price on the invoice was to be the OPA price; and I was to pay the difference between their price, \$57.50, in cash, which I did by giving the money to Malaby who then gave me a receipt. This was done in the presence of Lowenthal.

Cross Examination

By Mr. McGuire:

I first met Lowenthal through an introduction by the bartender in the bar at Golden Gate and Turk, in San Francisco. Lowenthal told me to meet him the next day at the same place and we would go down to see Malaby. I did that. Malaby, and Lowenthal, and I all went in the back office of Mr. Files' office. We all went back to the counter. Malaby gave me Government's Exhibit 7-A when I gave him the money. I did not give Lowenthal any money. All negotiations leading up to the closing of the deal were between Malaby and myself. Lowenthal merely introduced me.

Redirect Examination

By Mr. Licking:

Before Lowenthal introduced me to Malaby, the price had already been discussed, and all other discussions between me and Malaby were in the pres-

(Testimony of Robert C. Thomason.)

ence of Lowenthal and within his hearing; and Lowenthal took part in the conversation with Malaby. I do not remember exactly in what way.

(Witness excused.)

MARGARET McNEIL,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking: [107]

I am in business at 740 San Pablo Avenue, El Cerrito, at the Big Boy Barbecue, and have a restaurant and bar there. Early last year I purchased or agreed to purchase some McHenry whisky, and to that end first contacted a fellow by the name of Newkirk (213) whom I had met at the service station where he was an attendant. About two weeks later I gave a check which was payable to the International Import Company, and which check was taken to the bank and certified, and I got a debit slip for it. When I first talked with Newkirk about it, he did not seem to know an awful lot about it. He said he would have to make a telephone call and get hold of the party. The next person I met was Lowenthal, who is here in court. I had never met him before he came to my house with Newkirk. My husband and a friend of ours were there. Lowenthal had some samples of McHenry Blended Whisky. I sampled it by pouring it in a saucer and

(Testimony of Margaret McNeil.)

saw that it would burn. I do not remember the exact conversation, but I told him we were short of whisky and wanted some. He said he would give it to us within 21 days at \$64, of which \$5344 was to be in cash, which I handed over to Lowenthal. I ordered 200 cases. The balance for the whisky was to be paid in cash when the whisky was delivered. No discussion was had as to the OPA ceiling price. Subsequently 50 cases were delivered. Delivery receipt attached to Government's Exhibit 7-A, showing the delivery of 50 cases of McHenry Reserve at \$30.70 per case, plus \$6.12 floor tax, totaling \$1809.50, which I paid out before the whisky was delivered, in addition to the \$5000 plus that I have spoken of. After meeting Lowenthal I met Malaby. When I paid Lowenthal \$5000 he gave me an order blank which had already been signed by Malaby. Later Malaby came to my place of business, with some lady. He asked if I had given Lowenthal an order and if he had gotten any money, stating that none had been turned over to him. He [108] said he had heard that Lowenthal had gotten an order from me, and I showed Malaby the order blank for 50 cases and the receipt for \$5344 (220) given to me by Lowenthal; and I told him I had given Lowenthal that money. Next I saw Newman, in about three or four days, at my place of business. He was with Malaby. They wanted to know if I gave Lowenthal an order; and I told them I had, and they asked how much money I had paid, and I

(Testimony of Margaret McNeil.)

told them how much, and they wanted to know if I had any witnesses to that effect, and I told them I did; and they said they would have to make the order good, but they had not as yet received the money from Lowenthal. Later I made a long distance telephone call to Los Angeles to get my money back. I do not know whether that was before or after Newman had come to my place. On that call I talked with Newman. I remember it was after I had first met Newman. I never at any time in the course of this business became familiar with the name of the International Import Company. (222) When Newman and Malaby were there I showed them the receipt that Lowenthal had given me, and I retained that receipt until later. Lowenthal called several times and we were trying to get the money straightened out, and I made an appointment for him to bring the money over to me, but he did not do it. I talked to Newman later, and he came to my home one night around 11:30 with Malaby. It seems that they had not yet gotten the money from Lowenthal. It did not seem like I was going to get anything, and I asked for my money back, and I told Lowenthal I wanted to call the deal off. I also told Newman and Malaby that. I got 50 cases of whisky, at the invoice charge, weeks after my talk with Newman and Malaby about the money. Since I received part of the liquor I have not talked to Malaby or Newman. I do not know where the \$5344 went except that I gave it to Lowenthal. I gave

(Testimony of Margaret McNeil.)

the receipt [109] that I had had from Lowenthal to Newman and Malaby the day that I gave them the check for the whisky. They told me they had not received the money I had given to Lowenthal. I could not get my money back from Lowenthal, so I was willing to let the deal go through, if I got the whisky that I had ordered.

Cross Examination

By Mr. McGuire:

I first met Lowenthal through Newkirk; and Lowenthal gave me an order that had previously been signed by Malaby, that called for 200 cases. I did not sign the order. This was on Sunday, when I gave him \$1200 less than \$5344, but he came back on Monday and got the \$1200, saying he was short in his figures and had made a mistake. He gave me a receipt for \$5344, yet up to that time he had only received \$4000; but he got the balance to make up the \$5344, the next day. Lowenthal did not tell me that they were not making deliveries of whisky and did not ask me if I wanted my money back. No such conversation took place. I saw Mr. Lowenthal later, at my place, my brother-in-law was there, but not Malaby or Newman. The conversation was concerning the return of my money. He said he had loaned \$2500 of my money to his brother, and he had gone south and he did not have the money. He also said he had \$2500 in a safe deposit box, but he did not tell me that he had given

(Testimony of Margaret McNeil.)

it to Malaby or Newman. I never did tell Malaby or Lowenthal that I was completely satisfied with the deal. (230) I never asked Lowenthal if he would sell some liquor for me. I did not give Lowenthal a list of liquor that I wanted him to sell. I have never seen the paper which has been marked Defendants' Exhibit B for Identification before this time.

Redirect Examination

By Mr. Licking:

I do not remember signing any new order or anything, but the paper you show me bears my signature, although I do not [110] remember signing it.

(At this point U. S. Exhibit 8-A for Identification was marked.)

Recross Examination

By McGuire:

When Lowenthal came to my place of business on Sunday, he gave me a receipt. I think there were three of them together. I kept two and I think Lowenthal kept one, but Newman and Malaby picked them up.

(Witness excused.)

MARTIN FUCHSLIN,

a witness for the Government, was recalled, and testified:

Direct Examination

By Mr. Licking:

The person I first talked with about this whisky was John McKinnon (233). I got a receipt for the extra money that I paid and that receipt was given to someone and destroyed when the whisky was delivered, when I paid the balance. Since I testified this morning I have met one of the men who was there at the time. The two men that were there were Newman and Malaby. I paid them before I got the liquor, and at that time I turned the receipt that had been given to me, over to them. I delivered the receipt to Newman.

Cross Examination

By Mr. Cannon:

Since this morning I have not talked to anybody about Mr. Newman being the one to whom I gave the receipt and by whom it was destroyed. Since I left the witness stand this morning no one has talked to me about Newman being the person by whom the receipt was destroyed. I was confused about Shaeffer and Newman this morning, but now I know it was Newman. This morning I did not know which was Newman and which was Shaeffer.

Redirect Examination

By Mr. Licking:

When the money was paid over I paid it in Files'

(Testimony of Martin Fuchslin.)

office [111] and while I am not positive, I think it was paid to Mr. Files. I could not tell whether Shaeffer was there or not, at that time.

(Witness excused)

ELLIOT R. SMITH,

a witness for the Government, being duly sworn, testified;

Direct Examination

By Mr. Licking:

I am a restaurant and saloon owner at 1782 West Seventh Street, Oakland, and during the forepart of last year I had a partner named J. H. Gibson, who is now in Texas in the armed service. Early in 1944 I had a deal on some McHenry whisky and first contacted Lowenthal. The whisky was later delivered to me, and I received an invoice on it which is Government's Exhibit 18 for Identification. The invoice is dated in May, and that is the time I received the liquor. The invoice is signed by my partner. About 10 weeks prior to May 24, the date of Government's Exhibit 18 for Identification, I had my first conversation. Lowenthal came to my place and introduced himself and said he was a liquor salesman. He was with a man named Navinger (242). Lowenthal did not have a sample of the whisky but he had the label and it looked all right. The price was to be \$65, to the best of my knowledge, for a case of fifths. I ordered 50 cases. At

(Testimony of Elliot R. Smith.)

that time I knew there was a ceiling price on liquor. The understanding was that there would be a differential to pay to Lowenthal over the regular price, which was to be paid before delivery, and which differential was to be paid in cash. At one time Lowenthal was there with Malaby. The last time I saw Lowenthal Newman was there, and I gave a certified check to Newman before the whisky was delivered. It was for the invoice on the liquor, as shown in Government's Exhibit 18 for Identification. That is the first time I saw Newman, and it is the only time I ever saw him. The overage was collected by Malaby and someone else [112]. Malaby and Lowenthal got the overage while Navinger was there. (245). The card which you show me is the one that Navinger and Lowenthal presented and has in figures \$1480.50, which represents what we paid over the nominal price of the whisky. The first conversation was on April 8, 1944, or very close to that date. We paid the overage very shortly after Lowenthal was there, but I cannot tell you the number of days. Malaby and Lowenthal were there, but I do not believe Newman was. The only time Newman was there was when I paid the invoice price by certified check.

Cross Examination

By Mr. Cannon:

The certified check that I gave to Newman is shown as Government's Exhibit 18 for Identification.

(Testimony of Elliot R. Smith.)

Cross Examination

By Mr. McQuire:

Every time that I have mentioned that Lowenthal was present on these conversations he was there, I am reasonably certain. When Lowenthal was first there he showed me brands of several kinds of liquor, and told me the price was \$65 a case of fifths. I do not believe I signed anything then. Later Lowenthal came back with Malaby (251). I do not know who I paid the money for the overage to. It was to either Malaby or Lowenthal. They were both there at the time. I do not know who picked it up.

(Witness excused.)

JACK CARDINELLI,

a witness for the Government, being duly sworn,
testified:

My name is Jack Cardinelli, and I live in Pittsburgh. In the early part of last year I purchased or agreed to purchase a quantity of McHenry whisky. I believe it was around March. I first contacted Malaby at Richmond. I was introduced to him by a man in the tavern, and I had a conversation with Malaby, who told me he had whisky and he gave me a price, including [113] the overage, which was the difference between the OPA and \$61.50. There was a discussion that the price to be paid was to

(Testimony of Jack Cardinelli.)

be over and above the ceiling price, or OPA price, and this overage was to be paid before delivery of the whisky. I placed no order then but later met him at the Sutter Hotel in San Francisco, within two or three days. He had given me his phone and I called and made an appointment with him. At that time I discussed buying 225 cases and the difference between the OPA ceiling price and the asked price was approximately \$6000, which Malaby said must be paid in cash. I paid it to Malaby in cash at the Sutter Hotel, at that time. I was at that time given just an ordinary statement invoice of the account for 225 cases of McHenry which had the OPA price on it. I saw Malaby on and off after that. I later saw him at the Palace Hotel while Newman and Cain were with him. They were in the same room at the Palace with me. I got a call from Malaby telling me that they had the whisky, that it had arrived in Los Angeles, and for me to come up and get an invoice and that they were going to ship 25 cases, or something like that, to me. I went to the Palace to get the invoice and went to Malaby's room. He took me up. That was when I first met Newman and Cain. It was a room with two beds in it—twin beds—and had a small stand on one end with a typewriter on it. Newman was making out invoices on the typewriter, and I got an invoice that day. I was introduced to Cain. Newman was getting his information from Malaby to make out the invoices. Cain was lying on the bed, to the right of the typewriter, about eight feet away. I

(Testimony of Jack Cardinelli.)

was standing about even with the bed. I overheard a conversation between Malaby and Newman then, and Cain was on the bed as I have described, as far as I remember. It was only a few minutes since I had been introduced to him. Newman asked Malaby, as Newman was making out the invoices, [114] "How about the overage?" referring to my transaction, and Malaby says, "Yes, I have got it." (259) That conversation was in the presence of the three defendants.

Mr. Licking: If your Honor please, I will offer this evidence of this conversation against the defendant Cain and the defendants Newman and Malaby.

Mr. Ames: Malaby?

Mr. Licking: Malaby is not on trial or I would naturally offer it against him. (259-260).

Cross Examination

By Mr. Ames:

My place of business in Pt. San Pablo, but I live in Pittsburg. I have no tavern. I am in the fish reduction business (260) and not in the liquor business. I was buying this liquor for a fraternal organization—the Elks, at Pittsburg. I have nothing to do with the management of the Elks at Pittsburg, and do not run the bar. Malaby is the first man I saw about liquor, in March or April, as I remember, 1944. I never received any of the liquor, so there was never any invoice. I got the order blank I told you about. I do not know what has become

(Testimony of Jack Cardinelli.)

of it, although I suppose it was given to me. I looked for it and I do not know where it is. I turned it over to the Elks. It was not signed by anybody. Malaby wrote it up. Some time in May I came to San Francisco and went to the Palace Hotel where Malaby was. I talked very little to Cain. I said, "How do you do" when I was introduced.

Q. As a matter of fact, you did not have any conversation with him at all, isn't that true?

A. Well, that depends.

Q. I mean except friendly greetings.

A. Something like that.

Q. You did not talk to him about any liquor?

A. No, that is right. [115]

Q. You never got any liquor?

A. That is right. [262)

(Witness excused.)

JOHN P. KUSALO,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is John P. Kusalo, and I live at 10701 East Fourteenth Street, San Leandro, and I run a tavern and a restaurant in Oakland. Early last year I made a deal to buy some McHenry whisky and was first contacted by a man who runs the bar for Pete de Georgis. This was in April. De

(Testimony of John P. Kusalo.)

Georgis and I and Fred Christenson, the bartender, were there.

Mr. Cannon: Object to this as hearsay. It certainly does not identify the defendants.

Mr. Licking: It is the same situation. We will connect it up, Counsel. The conversation was had with Pete de Georgis and I intend to prove it is a part of the same conspiracy, dealing in the same liquor. (264)

The Court: Well, subject to a motion to strike, I will overrule the objection. (265)

(Witness continuing:)

De Georgis asked me how many cases I wanted and I told him 25, and he wanted to know if I would pay cash for it, and I told him I did not have the cash, but that I would give him a check. Then he said to make one check for International Import for \$868.56 and another check for \$691.44. The amount of the two checks was the total price for the 25 cases of McHenry blended whisky. I did not get a sample. The two checks are Government's Exhibit 20-A and 20-B, and I gave those checks to Pete de Georgis and they were afterwards cashed and went through my bank account. About three weeks later I got the whisky, and when the driver brought it I signed a receipt for it. I [116] paid the express, \$8. My signature does not appear on Government's Exhibit 20, nor on the second of those sheets. I do not recall anyone else in the transaction except de Georgis and the expressman who delivered the whisky.

(Testimony of John P. Kusalo.)

Cross Examination

By Mr. Cannon:

Government's Exhibit 20-B for Identification shows the name of John Kusalo by Christenson. Christenson is the bartender for Pete de Georgis. He was there when I gave the money to de Georgis.

(Witness excused.)

PETE de GEORGIS,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Pete de Georgis, and I am the Manager of the Miami Inn, 1614 San Pablo Avenue, El Cerrito, California. Of the defendants on trial I know Charles Malaby and I have seen Nathan Newman. The early part of last year I recall a transaction I had where I purchased some whisky. I first contacted Malaby, in April, February, or March. He came to my place of business and introduced himself. Malaby and I were there alone. Malaby talked about some liquor at that time. I did not have any and was interested in getting some, and asked him what kind it was. At that particular time he was not sure what brand he would have, but he came back a week or so later and told me the brand was McHenry Blended, I believe. When Malaby came back he was alone

(Testimony of Pete de Georgis.)

with me and we discussed the price and the delivery, and Malaby said there would be a ceiling price and an overcharge price, to be paid separately. I was to pay the overage in cash immediately and a check was to be sent to International Import Company for the ceiling price, a little later. At that time I gave him \$2000 cash, currency, and a few weeks later there was an order from the [117] International Import Company for 100 cases sold to one A. Fera, the licensee. The \$2000 cash was paid to Malaby. I met Nathan Newman when they came to the place of business to get the check of the International Import Company. It was a cashier's check for \$3640. When Newman was there there was no discussion about it.

(At this point U. S. Exhibit 9-A for Identification was marked.)

(Witness continuing:)

When I made the cash payment of \$2000 to Malaby no receipt was given for it. I saw Newman again after he came in to pick up the cashier's check. He stopped later with Malaby and told me the car of McHenry was in, and he brought me a check for \$29 which I had paid over the ceiling price. I was connected with another transaction in this same matter. It was with a friend of mine in East Oakland by the name of John Kusalo who was in need of whisky. I also had another connection with another party, Joe Porfido (273). I had a bartender by the name of Fred Christenson

(Testimony of Pete de Georgis.)

who knew Kusalo. I asked Malaby if he had any whisky that they could give to Kusalo, and he told me he had 49 cases left in the car, and he would give him 24 cases of it. So they gave me an order form as to how much it was, the ceiling price, and the above price, and came out to the place the next evening—that is, I discussed it with Malaby and Newman. In my own transactions I dealt with Malaby alone, except for the ceiling price, but in the Kusalo transaction I talked to both Newman and Malaby. Malaby gave me the order blank for Kusalo and picked up that order blank. Exhibit 20-B for Identification are the order blanks to which I refer. Kusalo and Porfido waited that evening until about eight or nine o'clock, but then went back to their place of business, and I said that when they came here I would just give [118] them the money for Kusalo and Porfido. So they left one check for the International Import Company and one check for the overage; that is, Kusalo did. Government's Exhibits 20-A and 20 are those checks to which I refer. I turned the International Import Company check over to both Malaby and Newman. They would not take the check payable to cash, so I cashed it and gave them the cash for it. That is Government's Exhibit 20 for the overage. I am certain that both Newman and Malaby were there when they refused to take the check for the overage.

Porfido does business on Telegraph Avenue and Thirty-second. Before this I did not know him,

(Testimony of Pete de Georgis.)

but knew his brother-in-law, who asked me if I could do him a favor and help get some whisky for him, and he sent Porfido to see me at about this same time (276). I had a conversation with Porfido. I had previously discussed the deal with the brother-in-law and explained to him what the deal was, and Porfido ordered 25 cases, and asked me if I could get him some more. I did not take any money from him at all at that time, but later took up the deal with Malaby and the same procedure was followed as in the Kusalo transaction. Malaby gave me the same two slips to have signed by Porfido, who had to get the money in two separate payments, one for the invoice to the International Import Company, and the other for the overage (278). Porfido came back to my place the next day and left the check for the International Import Company and he did not have enough cash, so I told him to write out a check to me, personally, and I cashed it, and gave him the cash. Government's Exhibit 19-B for Identification, a check dated June 3, 1944, payable to Pete de Georgis, is the check to which I refer, and it is the overage price. I cashed that check personally. I do not remember the exact figures in cash, but there were 49 cases [119] left in the car, all together, so Malaby gave me those 49 cases for these friends of mine. I gave the check payable to International Import Company to Malaby and Newman. I cashed the two checks, the one of Porfido and the one for Kusalo, made payable to cash, for the overage, and turned the cash over to

(Testimony of Pete de Georgis.)

both Newman and Malaby. In other words, my deal was with Malaby alone, but the other two deals were with Malaby and Newman together.

Cross Examination

By Mr. Cannon:

I had never seen Malaby before I gave him the \$2000, but he had been there a few times talking about this whisky deal before I gave it to him. I did not take any receipt for that payment. I did not take a receipt from Malaby or Newman for any of the money that was paid to them in cash.

(Witness excused.)

PETER REALI,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Peter Reali, and I run a restaurant and bar at 412 Fourteenth Street, Oakland, where I have been about twelve years. I recall a transaction sometime in the spring of last year when I purchased or agreed to purchase some McHenry whisky. I had previously had a lot of telephone calls to find out if I was interested in whisky. The first man that contacted me was Malaby, I think. I got two cards, one of which has on it the name of Lowenthal. I do not know much about Lowen-

(Testimony of Peter Reali.)

thal, but I think Malaby was at my place a couple of times alone, and he finally interested me in getting some whisky. It was in April or May. I gave the gentlemen four hundred and some odd dollars and I paid the balance by a certified check, I believe. When I got the receipt I paid the money, a little over \$400, in addition to the price set [120] out on the Customer's Receipt and Invoice. I knew I was paying over the ceiling price for this liquor. The time Malaby came to get the money and give me the papers, some one else was with him.

Q. You don't remember the name Mr. Malaby gave you?

A. At the time he came up there I believe he introduced Mr. Newman. I think that was the name.

Mr. Cannon: I might ask if Mr. Bird also gave him the picture of Mr. Newman.

The Witness: No. He showed me a picture and I said, "Those are the gentlemen."

Mr. Licking: Q. Do you see Mr. Newman here now?

A. Well, it looks like that gentleman over there.

Mr. Cannon: Which one?

A. The one over there.

Mr. Cannon: Mr. Shaeffer you have identified.

The Witness: Well, it looks something like——

Mr. Licking: Dark hair?

A. Yes.

Q. You know there was another person there,

(Testimony of Peter Reali.)

and to your recollection he was introduced as Newman? A. Yes.

Q. You don't recall his face? A. No.

Q. That was the only time you ever saw him?

A. That is all. (285-286)

Cross Examination

By Mr. McGuire:

I believe Malaby came to my place first. Mr. Navinger was with Mr. Lowenthal when Lowenthal came and gave me his card (286), and I think he said, "I am a liquor importing company if you need any liquor." I believe that is all the discussion I had with Lowenthal. I never paid him any money [121] and never participated with him in any documents.

(At this point the two cards and the invoice headed "National Import Company" were admitted as Government's Exhibits 10 and 10-A for Identification.)

(Witness excused.)

WILLIAM P. BRYDEN,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is William Percy Bryden, and I am a tavern owner in El Cerrito. The early part of last

(Testimony of William P. Bryden.)

year I had some dealings on McHenry whisky and first contacted Malaby alone. He came to my place and asked for the proprietor, and wanted to know if I was in the market to buy some whisky. This was about April. I said I was. He named the whisky as McHenry's, but did not quote any price then, and had no sample. About a week later he came back by himself, and said he could produce the whisky shortly, and said the price would be \$62.50 per case, and said that when he was ready to produce the whisky he would come around again and see me (290), and he did about May 1. He was alone, and said the whisky would be there shortly, that he would see me again when he was ready to produce, but made no request then for any money. The next time he came he had another man with him, by the name of Newman. That was may 25, and I agreed to buy 20 cases at \$62.50 a case. I received a receipt for 20 cases of whisky. I made a personal check to International Import Company for \$723.80, and the balance of \$526.20 was paid in cash in the presence of Malaby and Newman (292). I got no receipt for this \$526.20. Government's Exhibit 11, consisting of an invoice for 20 cases of McHenry whisky for \$723 and some odd cents, are the papers which were given to me at the time, when Newman and Malaby [122] were both there. At that time I gave a check payable to the International Import Company, and paid the cash balance.

(Testimony of William P. Bryden.)

Cross Examination

By Mr. Cannon:

When I made these payments I knew it was a violation of law.

(Witness excused.)

NELLO NOMELLINI,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Nello Nomellini and I am the manager of the Bluebird Cafe, owned by Luigi Di Ricco who also owns El Lido, but I only manage the Bluebird. In the early part of last year I purchased or agreed to purchase for Mr. Ricco certain McHenry whisky, and first talked with Malaby about it. He was alone. He came to my place. He said he had some whisky and it was McHenry's and I think straight whisky. When I first talked with Malaby we discussed the price, around \$27, I was to pay, and in addition to that \$26 a case. The order which you show me was signed later. At the first conversation I paid \$1800 and something to Malaby (297); that is, I paid it down at Files' place, where Malaby took me at a later date. I believe Newman was also at Files' office. At Files' office I talked about turning the money over the purchase of whisky, but I don't know with whom I talked, as

(Testimony of Nello Nomellini.)

the main guy I know is Malaby, and the one I made the deal with; but Files and Newman were there where they could hear the conversation. I got a receipt for my money, but I did not keep it. Government's Exhibit 12-A and 12-B show whisky for El Lido and the Bluebird, and I paid a deposit for both. These papers were brought to my place by Newman and Malaby. When I got the receipt at Files' office I do not know who signed it, but the three of them were there at the [123] time, and later when the invoices for the whisky were made out I gave the receipts back to Mr. Newman. Newman and Malaby brought the invoices and receipts to me.

Cross Examination

By Mr. Cannon:

I think when I made this deal I may have known that I was violating the law.

(Witness excused.)

LUIGI DI RICCO,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Luigi Di Ricco, and I operate El Lido Bocce Ball Alley and also the Bluebird which is run for me by Nello Nomellini. Nomellini did the buying and paying for the McHenry whisky. My signature is on Government's Exhibit 12 for Identifi-

(Testimony of Luigi Di Ricco.)

cation. Malaby gave me those to sign. I do not know whether any one was with him at the time because Nello handled the whole deal.

(Witness excused.)

WILLIAM H. BENSON,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is William H. Benson and I am in the general brokerage business, which is real estate and things like that. I was in Los Angeles for about ten years and am staying down here at the Stanford Hotel. I know Mr. Malaby and I know Newman by sight. I also know Cain, Shaeffer, and Files. I have known Malaby twelve or thirteen years and recall in the early part of last year introducing Malaby to Frank Spenger in Berkeley (307). On one occasion I went with Malaby to Spenger's place, to bring Spenger to San Francisco when they consummated their deal. I got off at the corner of Bush and Kearny in San Francisco and went to my [124] hotel, but I met Spenger a couple of hours later. We had come over to San Francisco in my car. I went to Files' office in connection with this transaction on several different occasions. I discussed with Spenger his transaction with Malaby. Spenger showed me the check that he had given in

(Testimony of William H. Benson.)

the deal. It is Government's Exhibit 4-A for Identification. He showed me it after it was endorsed and paid. He showed me the receipt after he came back from Files' office. After the check had been endorsed and paid I went to see Spenger, at his request, and subsequently went to Files' office on the transaction. This was also at Spenger's request. I went to Files' office alone first, and saw Files, and asked him if he had cashed Spenger's check. Files said he had, or rather that he had turned it over to some one, but he did not tell me at the time who it was. I called his attention to the terms of the escrow agreement being for ninety days, and he said it was his understanding that when the merchandise was to be delivered it was to be turned over. To my knowledge no merchandise had been delivered on April 24. There was no discussion as to the 90-day retention clause in Files' receipt. There was a discussion regarding getting Spenger's money back. As soon as I got through talking to Files I went back to my hotel and called Spenger and asked him if he would come over the following day and see me, and he did so. Then I had Files come to my hotel the next day and we went up to my room and discussed it; that is, Spenger, Files, and I. This was about a couple of weeks after the check had been cashed. The conversation between Files and Spenger was trying to work out something for the protection of Spenger in regard to his check, to protect him and to see

(Testimony of William H. Benson.)

what could be done in regard to returning the money. Files was willing to cooperate and do everything he possibly could, and Files [125] suggested we try to work out some sort of security for the protection of Spenger's money. Two different matters were mentioned. One was some lots that he was interested in and also some vegetable crop of some kind. No mention was made as to where the money had gone. I told Spenger and Files that I knew Cain personally and I would get in touch,—Malaby claimed to represent the International Import Company. Spenger asked Files where the money had gone, and Files didn't know; he turned it over.

Cross Examination

By Mr. McDonald:

Files told Spenger and me that the check had been turned over to Malaby.

(Witness excused.)

JOHN A. McKINNON,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is John A. McKinnon, and I am a salesman. In the early part of last year I met Oscar Lowenthal by selling him an insurance policy. That was a year and a half ago. I met him in con-

(Testimony of John A. McKinnon.)

nection with the sale and distribution for the International Import Company—that is, McHenry whisky—in March, or April, or May, when he told me he was going into the wholesale liquor business, and said he was going to see Malaby in three or four days. Malaby later talked to us about ten or fifteen minutes. I met Malaby at Lowenthal's home. Malaby said they were going to have a warehouse in San Francisco, and were going to hire some salesmen, and said that in a few days he ought to have things for us fellows to work with. In four or five days he gave us a piece of paper, stating the prices and amounts of whisky. One of the brands was McHenry. The price for the McHenry whisky on this list was \$56 or \$57 or something like that. Malaby gave me the list (318) when [126] Lowenthal was present, although I wouldn't swear whether he was right in the room at the same time. I went to work for Malaby, I think, although I really don't know who I went to work for. I got one commission. After I got this list giving me the prices I kept waiting for about a month for a letter authorizing me to sell the whisky, but I never did get such a letter. Later I went to see a friend of mine at the William Tell Hotel, and later I met Mr. Fuchslin. I showed Fuchslin the list of liquor and later had a discussion with him about the sale and purchase of liquor (324). He said he did not know how much liquor he could contract for at that time, and I told him he would have to go up on Kearny Street, and perhaps we could work out something (325).

(Testimony of John A. McKinnon.)

Mr. Malaby had previously told us about Files' office, and of the necessity of going there in connection with these transactions, and he had said that they had to leave a deposit at that office. Lowenthal and I were not authorized to take any orders, or any money, so Malaby said. I had told Fuchslin to meet me at Files' office, where Malaby would be the next morning at 10 o'clock; but Malaby wasn't there. Files and Shaeffer were there. I was to get five percent commission on the transaction. Malaby had told me that half of the money to be paid for the liquor was to be paid now, but I do not know how the other half was to be collected; but I think it was before the shipment got in there. The down payment was to be one-half of the total cost (329). I did not know anything about the ceiling price. There was nothing discussed or anything of that nature. Since that time, and since I have been around here, I have found out that there was such a thing as a ceiling price on whisky. When I went with Fuchslin to Files' office, there was no one there besides myself, Fuchslin, Files, and Shaeffer (330), and Fuchslin turned over something [127] like \$1200. He was counting out the money, and in the meantime I left the office because I didn't know whether I was permitted in there or not. The first time we met Malaby he told us that the money was supposed to be deposited in Files' office, and Malaby took Lowenthal and me down to Files' office and introduced us to Files and Shaeffer, but nothing was discussed at that time. He told us that

(Testimony of John A. McKinnon.)

we were going to represent him in that territory (332). He said whenever we had any deals to make to bring them to the office, and to meet him there. When I went to Files' office with Fuchslin, Shaeffer and Files were there, and I introduced Fuchslin, and told them he wanted to leave a deposit there for some liquor. Before I took Fuchslin inside, I discussed with him about the \$1200, which amount I had taken off the list which Malaby had given me; and I showed to Fuchslin from that list that he would have to pay down \$1200. Fuchslin then left in the office something over \$1200 cash. I did not see whether Files or Shaeffer gave Fuchslin a receipt for the money. Malaby was to give me my cut out of the money deposited. I was to get five percent of the total price. Later I met a friend of a friend of mine, a Mr. Becker, who operates a tavern, and when I asked him about getting some liquor he said he didn't have much money, but he gave me \$300 which I took down to Files' office. He wanted 25 cases, and the deal was never completed because I know that Malaby refunded this \$300 to Becker.

Cross Examination

By Mr. McGuire:

I think it must have been March or April when I first met Lowenthal regarding this transaction. I met him at his apartment, and he said he had just found out where we could go and sell liquor. He told me about it, and where we could get five percent commission. He told me Malaby was the man

(Testimony of John A. McKinnon.)

he had talked to; and that Malaby was a representative of the [128] International Import Company in Los Angeles; and said they wanted him to get a license to be a distributor, or a wholesaler; and that he had written to Sacramento. He was told to go to the Equalization Board here, and that Board told us to get a letter from the organization authorized to sell liquor. We were waiting for that letter all this time. The next time I saw Lowenthal was at his apartment, and Malaby was there, but we did not have much of a conversation. We asked him for a letter, and he said he would get it for us eventually. Malaby told us the Import Company was very responsible, and we found that out for ourselves (340). Malaby gave us the information regarding the price of the liquor; he said it would sell for \$57 a case, and that included the freight and all expenses. Nothing was said about the ceiling price. We were supposed to have cards, so Mr. Malaby said, and he also said that we would have an order book or something like that. We were not supposed to sign any orders, so Malaby said, nor collect any money. We were just to contact people, and turn them over to Malaby.

Cross Examination

By Mr. Ames:

I did not testify that Mr. Malaby was trying to get a wholesale license to sell liquor in California. It was Lowenthal that wrote to Sacramento. I never did get any letter of authorization from the International Import Company.

(Testimony of John A. McKinnon.)

Cross Examination

By Mr. Gillen:

I was the first man to contact Mr. Fuchslin through a Swiss friend at the William Tell Hotel (343). There was nothing said that night about the ceiling price. I went to meet Malaby at Files' office, around ten thirty the next morning, because he said he would meet me there. I went to Files' office and Fuchslin had not yet arrived. I had already met Files before that. I met Files outside and I told him I was [129] waiting for a gentleman to come down there, who wanted to deposit some money, and he said that that would be all right. I did not meet Mr. Fuchslin on the street. I was inside when I met Fuchslin. There was nothing discussed at Mr. Files' office about any ceiling price.

(Witness excused.)

JOHN De SILVA,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is John de Silva, and I had a business of a saloon in San Leandro. I had a transaction on McHenry's whisky in the early part of last year, and was first contacted by Newkirk. This was sometime in March or April. We talked alone. Later Newkirk brought Lowenthal in, and Lowenthal and

(Testimony of John de Silva.)

I talked after Newkirk left. Someone else was with Lowenthal, but I do not know who it was. We talked about the price being \$57 a case for McHenry Blended whisky (349). I saw a sample, but did not taste it. I ordered ten cases, and I was to give them \$285 in cash, and Lowenthal said the deposit should be in cash. I signed the purchase order when I picked the ten cases up in the warehouse. I think I signed the receipt for the merchandise when Lowenthal and the other man were there. That receipt is marked Government's Exhibit 25 for Identification, and the receipt for the merchandise is marked Government's Exhibit 25-A for Identification (351). Lowenthal left a card with me and I called, after I had waited about three weeks for the whisky, and got in touch with Malaby. He came to my place of business. When I gave Lowenthal the cash another man was with him, but it was not Malaby. I later telephoned to Malaby (352). When I signed Government's Exhibit 25-A, and the Invoice marked "Paid," Newman was there. When Malaby came over after my telephone call, he told me the whisky would be there [130] in a few days, and at that time he picked up the invoice price for the whisky. Both Newman and Malaby were there, and I do not know which one of them got the money. I later picked up the whisky at the warehouse. When Lowenthal and the other man that was with him got the cash that I paid down, I got a receipt which I believe I still have in my receipts at home (354).

(Testimony of John de Silva.)

Cross Examination

By Mr. McGuire:

Exhibit 25-A was given to me by Malaby and Newman, and at that time I paid the check. When Lowenthal first came to my place he was with Newkirk. I did not order any Cobb's Creek whisky. I bought two cases of Rock Creek whisky (356). Government's Exhibit 25 calls for ten cases of mixed whisky. I do not recall whether Exhibit 25 was given to me by Lowenthal or the man that was with him (357). I did not give this order to Malaby for ten cases of mixed whisky. No one delivered any part of that whisky.

(Witness excused.)

AMARO PITTA,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Amaro Pitta, and I am a tavern owner in Oakland and have been since February, 1944. In April or May of last year, I agreed to purchase a certain amount of McHenry whisky. I first contacted Mr. Malaby at my place of business. I had met him before at my place. I first met him in San Francisco when he was trying to sell a fellow some whisky, and I was badly in need of some whisky so he came over to my place and talked

(Testimony of Amaro Pitta.)

with me alone, about selling me some 100-proof McHenry whisky. My first order was for 100 cases of 100-proof. I signed an order slip at that time, at the price of \$38.73 a case. I was supposed to put up \$3200 in San Francisco. The order shows [131] on its face "No cash down," but I did pay at Files' office the cash. Shaeffer was there, and I gave him the \$3200 to put in escrow. Malaby was also there. They were supposed to turn this money over to Cain when I got delivery of my 100 cases of whisky. I was to pay out the price set out on the slip when the whisky was delivered. When I went to Files' office, Shaeffer was alone there. I got a receipt for the money; the receipt was signed by Files. Shaeffer said Files was at the race track, and it was all right for Shaeffer to take the money. The discussion concerning the terms of the escrow was between Malaby, Shaeffer, and myself (363). Later I gave another order for 25 cases of McHenry Blend whisky. That was May 31. I was negotiating with Malaby, and that was after I had put up the money in escrow for the 100 cases. The price on this was \$30.07 plus a certain amount of taxes, but there was to be additional payment so the whole thing all together amounted to \$57 a case. The difference between the amount appearing on the first sheet of Exhibit 14 and \$57 a case was paid in cash by me to Malaby. I received the 25 cases of whisky, but it was later quarantined by the health officer (365).

(Testimony of Amaro Pitta.)

(At this point, the documents marked, respectively, U. S. Exhibits 14 and 14-A for Identification, were marked.)

(Witness continuing:)

The 25 cases of the Blended whisky were eventually returned to International Import Company. I never did get the 100-proof whisky for which I had paid down a premium of \$3200. Later I went to Files' office, and to Shaeffer, and they kept promising me they would give me the money back, because I told them I needed it to buy other whisky to operate my business. Finally, I got them to sign a note that they would pay me in sixteen days, but when the sixteenth day was up they still [132] stalled me (366). I still have the note and it has not been paid. Exhibit 14-C for Identification is the promissory note.

Cross Examination

By Mr. Gillen:

I first met Malaby in San Francisco, and told him I needed whisky, and he went over to my place of business across the bay at my request. I made arrangements there with him to buy the first 100 cases of whisky. He told me the money had to be deposited in escrow in San Francisco, and he brought me over to San Francisco, and that is where I got this receipt. The names of Files was already signed to it when I got it. All Shaeffer did was to say how much money I was going to put

(Testimony of Amaro Pitta.)

up in escrow. He filled it in, and gave me the receipt that Mr. Files had signed.

Cross Examination

By Mr. Ames:

The first order that I talked about was 100 cases of McHenry 100-proof Bonded, with a McHenry label. I never did find out whether there was any of such liquor or not. I never did buy any other brand of whisky from Malaby.

Redirect Examination

By Mr. Licking:

When I went to Mr. Files' office and saw Shaef-fer, I turned the money over to Shaeffer. The only discussion was that I was to leave the money there in escrow until I received my liquor. It was to be held pending the delivery of the liquor.

(Witness excused.)

JOSEPH PORFIDO,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Joseph Porfido, and I live in Oak-land, and I am a bar owner. I know Pete de Georgis, and recall that early last year I was short of whisky and asked Pete if he could help me get some. I paid Pete some money. Afterwards [133]

(Testimony of Joseph Porfido.)

I received some whisky. George Bonanzo is my partner and he is the one who made the deal (370). I know two checks were issued, one payable to International Import Company. This was certified, and is marked Government's Exhibit 19-A for Identification.

(Witness excused.)

MANUEL COSTA, Jr.,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Manual Costa, Jr., and I work for my father (371) in a beer parlor in Oakland. During the first part of last year we bought, or were concerned in buying, some McHenry whisky. Malaby was in the place a couple of days before he and Nathan Newman came there. When Malaby first came there he introduced himself and then later he introduced me to Newman. They said they had whisky for sale—McHenry whisky—and that they would sell me 50 cases. If they gave me any price, I do not remember (374). I do not recall that I ever saw them again after that, but I made the deal right there. I do not remember exactly what the price was, but I believe it was \$60 a case. After I had signed the deal he asked me for \$1200 on the 50 cases. I gave them the \$1200 but got no receipt.

(Testimony of Manuel Costa, Jr.)

I got an order. I paid the \$1200 in cash. I usually pay my bills in cash. There was nothing unusual about paying this \$1200 in cash. I usually get receipts from other people, but not from these people. I got nothing to show for the \$1200. I ordered 50 cases (376). The first sheet of Government's Exhibit No. 13 for Identification has my father's signature, and is an order for 50 cases of straight bourbon bonded whisky. That is the whisky we got when the Government came around and took it away. The next two papers on that exhibit have my signature on them and show [134] 50 cases of McHenry's Reserve; but we never got it. This paper that I signed showed the amount of \$1809 had been paid. That is the amount of the certified check. The \$1809.50 certified check debit is marked U. S. Exhibit 13-A for Identification. I did not make the deal for 50 cases of straight bourbon, and know nothing about that deal.

Cross Examination

By Mr. Cannon:

Malaby and Newman came in together one morning about nine-thirty, and I gave them \$1200. Before that I had never seen anybody about this deal.

Cross Examination

By Mr. Ames:

I know nothing about the deal shown on Government's Exhibit 13-B, which has my father's signature.

(Testimony of Manuel Costa, Jr.)

Redirect Examination

By Mr. Licking:

I know that the \$1200 I paid was not on the order that my father signed.

(Witness excused.)

RICHARD NEWKIRK,

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Richard Newkirk, and I manufacture valves for the penicillin program, and live in Berkeley. Early in 1944 I was employed as manager in a gas station. I know Lowenthal and have known him about ten months. I met him through a mutual friend in San Francisco in a bar. Lowenthal said he was a liquor salesman. It was sometime along in March or April. He told me if I met anybody who wanted to buy any whisky to let him know, and he would give me part of his commission. He did not give me any idea of price or quantity, and did not say who he was working for. Later I was down to Johnny de Silva's place, where I used to go to cash my checks (382), and de Silva said he was short of whisky and I [135] told him I thought I knew where he could get some, and I took Lowenthal out and introduced him, and I left and went back to work. Lowenthal was going to give me

(Testimony of Richard Newkirk.)

5%. Later Mrs. McNeil, who operates the Big Boy Barbecue, came to see me about buying some whisky and I called up Lowenthal and took him out there, and she bought some whisky. I did not hear the conversation between Lowenthal and Mrs. McNeil, but I remember part of it, and that was that it was to be McHenry whisky at \$57.50 a case, for McHenry Blended whisky. The next day I went back with Lowenthal to the McNeil place. It seemed there was a mistake, and Lowenthal had to go back and straighten it out. I think it was to get more money from her, but all I know about it was what Lowenthal told me. The first time we were there I saw money pass. Mrs. McNeil brought out a box with money in it, and counted out money to Lowenthal. I do not know how much, but it was quite a large amount.

Cross Examination

By Mr. McGuire:

Mrs. McNeil's bartender told me she got 50 cases of whisky. Later I heard Lowenthal call Mrs. McNeil over the phone, from my service station. Mrs. McNeil told me she was perfectly satisfied with the deal, and that all of her customers seemed to be satisfied, too, with the whisky. It was pretty good whisky.

(Witness excused.)

IRA BURNETT,

a witness for the Government, being duly sworn,
testified:

Direct Examination

By Mr. Licking:

My name is Ira Burnett (386). I am a roofer. I know Malaby and have seen Newman, and I know Rocco. During the early part of last year I met Malaby in connection with some whisky transactions. I believe it was in March, in San Francisco, [136] and I was introduced to him by a casual acquaintance named Miller. Malaby said he had a line of whisky he would like to introduce around here, and if I could hear of anybody to let him know. He told me it was McHenry whisky; and that he had several different lines on the same order (388). I gave Malaby my card, and he gave me his card. Later I saw him. This was in about two weeks. I had been to Santa Rosa and talked with Rocco, and there were several people who wanted McHenry whisky, but I did not know anything about the price until we had had our meeting; that is, until I had talked to Mr. Malaby. He asked me to arrange a meeting between him and Rocco, and he told me the price of the McHenry whisky was \$51. and something, but the price changed (390). Later I went back and talked with Rocco, and told him the story I have just told here, and he said there were three persons up there who had been after him for whisky. A few days later Malaby furnished me with a sample of whisky, but not with any order blanks or receipts

(Testimony of Ira Burnett.)

at that time. I gave Rocco the sample of whisky, and gave him the price that Malaby had given me, but it subsequently raised some \$6.42 from the quoted price of \$51. At the time Malaby told me about the price he told me the above ceiling price could be paid before delivery of the whisky (391). I knew before the sale of the whisky was made that it was made above the ceiling price, and that it was contrary to law. Rocco was in the saloon business himself, and had two bars in Santa Rosa. A few days later Rocco called me, and told me that he had three orders for whisky, and said he had taken deposits for the overage. The price then was \$57.50, and he had taken the overage on that basis. I reported that to Malaby. I was then furnished by Malaby with papers or documents to be used in filling these orders. Government's Exhibits 16, 17, and [137] 15 for Enrico Barrotti at Santa Rosa, Charles Ferretti of Sonoma, and Johnson and Lichtenberg at Boyes Springs (392), were the ones which he gave me, and I had them all three executed. They were signed by Malaby when he gave them to me; that is, the first two were; the third one bears no signature. After I had had these Exhibits 15, 16 and 17 for Identification executed, I returned them to Malaby, and heard nothing more about them until things began to happen, which was after the first whisky had been delivered. The money that had been collected was turned over by Rocco to Malaby, in my presence. Neither I nor Rocco, so far as I know, got anything by way of

(Testimony of Ira Burnett.)

commission or any profit out of these deals. After these papers were signed, I phoned to Los Angeles once and tried to get hold of Malaby, to see if I could help things out or why the liquor did not come, or what could be done. That was just after the liquor had been confiscated, and had proved to be unacceptable to the customers (396). I called up the International Import Company, three times, but I think I only made a connection once, and that was with Malaby. Each other time I was told that Malaby or Newman were out. After this thing broke I urged Malaby to return the money, both the money that the people had paid for the invoice price of the whisky, and also the money that they had paid for deposit. I do not know of any that was returned. That is the last of my activity.

Cross Examination

By Mr. Cannon:

The arrangement for my commission had never been worked out definitely, but Malaby told me that he would take care of me for my time and trouble; and at the time that this sale was made he told me while the money was on the table at Rocco's house that there had been a raise in the price of the cost of the whisky, and there wasn't anything left for me; he was [138] sorry, but that was the way it was. Rocco paid this money to Malaby in cash. I believe it was \$5000 and something in currency. At the time I saw Malaby get this \$5000, Exhibits 15, 16, and 17 for Identification had not yet been signed. Later, even though Malaby

(Testimony of Ira Burnett.)

told me I was not going to get anything out of it, I went back and got these signatures as a favor to him. Malaby did not threaten me. No one ever suggested to me that I was liable to be indicted in this case. Mr. Bird of the OPA did not say one way or another. He took a statement from me and left my house. I was present when Malaby made out these sales slips to be signed by the customers, and I saw him sign them. Newman made them out in the Palace Hotel. Both Malaby and Newman were writing on them. I believe they were written by hand. I did not see them do any typing. I noticed that Exhibit 15 for Identification had typing on it. They both signed something in regard to these things but I cannot find any of them that are signed by Newman.

Cross Examination

By Mr. McGuire:

I first met Malaby about March 1944, and he asked me if I knew anybody who would be glad to have some of his whisky, and I told him I knew of several people who needed it. The price was not discussed. I saw him two weeks later, when the price of \$51 was discussed. He did not give me a breakdown of how the \$51 was made up. I did not ask him for it. I do not remember whether at that time he gave me any blanks or order slips of any kind (403).

(Witness excused.)

GUS GOLDSTEIN,

a witness for the Government, being duly sworn,
testified;

Direct Examination

By Mr. Licking:

My name is Gus Goldstein (405). I am manager of the [139] Warrant and Chief Petty Officers' Club in San Francisco, which is a non-commissioned naval officers' club. We have a bar there. During the early part of last year I recall a transaction concerning whisky. I first met Malaby and Newman. I subsequently met Cain. In the latter part of January 1944 I met Malaby in my place of business, when I was short of whisky, and I told him so and he said he was in a position to get me some; and said he had a couple of men whom he could introduce to me, who would supply whisky to me. There was no discussion of price at that time, but I knew there was a ceiling price on whisky. I met Malaby several times thereafter. I do not know exactly when I made arrangements for the whisky, but I know that the consummation of that agreement was made on or about January 31. In all of the negotiations I first had, Malaby was the party I dealt with; but Malaby introduced me to Newman before the deal was finished. This was early in January. When the deal was finally consummated Nathan Newman, Morrie Newman, and, I believe, Malaby were there, at the St. Francis Hotel, in one room. I made the appointment through Malaby with both of the Newmans to meet them there, and I carried on the conversation with everybody

(Testimony of Gus Goldstein.)

present (410). I am not positive whether Malaby was there during the entire transaction or not. We discussed the price of whisky to be furnished, and the manner and method of payment. Mr. Newman advised me that it would be necessary to pay some money down, and it would be held as a deposit, and this money was not to be touched until such time as the whisky was to be delivered, and at that time the balance of the money would be paid. The money to be paid down was something over \$20 a case, and the payment which was to be made when the whisky was delivered, was the ceiling price. I ordered 20 cases and made a deposit of \$20 a case over the ceiling. [140] During the course of making that deposit I met Files and Shaeffer, and I made the deposit at Files' office in the amount of \$4400 and some odd dollars, and git a receipt for it signed by Files. Nathan Newman went there with me (412). There was no conversation in the presence of Schaeffer and Files relative to the transaction, which I had previously arranged at the St. Francis Hotel. Mr. Files was instructed to hold the money for me, and to be released by me at a later date; but nothing was said as to the transaction. I was to give Files instructions and then the money was to be released to Mr. Newman at a certain time. There was no agreement at that time as to the fee he was to get for his services. Sometime later Nathan Newman came and told me the whisky was in Los Angeles, and that the money was needed to take up a sight draft or bill of lading attached to

(Testimony of Gus Goldstein.)

the draft, and that if I would release the money and give it to him, my whisky would be sent to me promptly. He first asked for \$7280, which was the ceiling money, and when I agreed to give him that, then he suggested that I release the money which was being held at Files' office; and I did that. I then gave the receipt that Files had given me to Newman, and paid the balance on the ceiling price for the 200 cases. I got a receipt, dated April 11 1943, which is an error because it should be 1944. Subsequently I got back part of the money which I had turned over. I got \$1500 from the International Import Company, signed by Nathan Newman, and I got some money back from Malaby, and that was the entire amount of the over ceiling. The photostat copy of a receipt, dated 6/5/44, "Received of Charles Malaby total of \$4032 in full repayment of loan" signed "Gus Goldstein" bears my signature. I have never made Malaby any loan. When Newman came to get the check in payment of the invoice, he paid me back four hundred odd dollars, which I [141] was lead to believe was because the ceiling price had been violated, and the repayment of that money was necessary to bring the cost of the whisky down to within the ceiling price.

(At this point, U. S. Exhibit 26 and 26-A for Identification, were marked.)

Cross Examination

By Mr. Cannon:

I do not own that Club where I am manager, but I hold the liquor license, and I am the sub-lessee

(Testimony of Gus Goldstein.)

of the premises, and I knew when I contracted for this liquor I was violating the law. I gave Malaby a receipt for a loan because that is the way he suggested it, and I knew I was giving the receipt in that way for the purpose of covering up, because it was a violation of the ceiling, and I knew I was committing a criminal offense in buying or contracting to buy liquor over ceiling (417). I have not been promised immunity in this case. My primary object in entering into this transaction was to get some whisky, and I did not necessarily intend to commit a crime (418). Malaby gave back the \$4032 because I demanded the return of my money and wanted to close the deal. I got in touch with the International Import Company in Los Angeles, and asked them to return my money, and they sent it up by Mr. Malaby. I talked with Mr. Newman, but I did not tell him that if he didn't send the money back that I was going to prosecute him. I have never threatened prosecution of any of these men, but I did swear out a complaint. I do not recall that I ever talked to anyone except my wife and my attorney about prosecuting these men.

Cross Examination

By Mr. Ames:

I did not telephone Cain and tell him that if he did not bring me back all of my money that I would have him put in jail. I did not give such a message to Miss Anderson, Mr .Cain's secretary. I first met Mr. Cain personally in [142] January, 1945, in my attorney's office; but I did not threaten to put him

(Testimony of Gus Goldstein.)

in jail. I did swear out a warrant for his arrest. The warrant was sworn out before I talked to Mr. Cain and his attorney in my attorney's office (422). I had called Mr. Cain on the telephone in Los Angeles, but I do not know when it was. It was after I got the \$4000 back from Malaby. At that time I was only demanding from Cain the money back on the whisky that had been condemned; the ceiling price.

Re-Direct Examination

By Mr. Licking:

When I telephoned down to the International Import Company about the return of the money which I had deposited with Files, and which was subsequently turned over to Mr. Newman, I spoke to Nathan Newman, Morrie Newman, and Mr. Cain (423). I do not recall whether I had spoken to Cain before Malaby paid back the \$4000. I spoke to Nathan Newman in Los Angeles about the return of the money, and it was after that conversation with him that Malaby came to San Francisco and gave me the money.

Re-Cross-Examination

By Mr. Ames:

The liquor I bought was not condemned. I bought Doggerty (424) straight whisky. It was not McHenry Reserve. Nathan Newman and Morrie Newman promised to deliver that to me. The name of the whisky was never discussed between Cain and me. I do not know whether Cain or anybody else ever had any Doggerty whisky I have never seen a bottle of it.

(Testimony of Gus Goldstein.)

Re-Cross Examination

By Mr. Cannon:

I delivered \$7280 to Mr. Newman in a check. Malaby was not there, and Newman gave me a receipt which had Malaby's name on it. When I asked him why he hadn't signed it instead of Malaby, he said it was because Malaby was the salesman for that territory. [143]

Further Redirect Examination

By Mr. Licking:

I have some other papers or memoranda in connection with this transaction. The letter dated April 17, from the International Import Company, acknowledging receipt of a cashier's check that I had turned over to Mr. Newman, has now been marked U. S. Exhibit 26-B for Identification. Malaby never got any whisky for me at all, but I did receive ten cases of Rocky Springs whisky through various transactions with Malaby. This was shipped from Los Angeles, and I paid the freight on it as it was supposed to have been part of the whisky that I had paid for; and it was sent to me after I had been in contact with the Newmans in Los Angeles, asking for delivery. I examined it and then rang up Los Angeles, the International Import Company, and told them that the whisky was not acceptable for my use, and I demanded that they take it off my hands. Malaby came up to the place and picked it up. All I had paid for it was the freight, which they did not refund to me. The letter which I received is marked part of U. S. Exhibit 26-B for

(Testimony of Gus Goldstein.)

Identification, and the Valley Express Company receipt and the invoice attached is marked Exhibit 26-C for Identification.

Further Recross Examination

By Mr. Ames:

I presume that the \$7280 that I sent to the International Import Company was the ceiling price of the whisky that I ordered, but I am not positive as I have no way of knowing. The amount of the check that I sent was intended by me to be the ceiling price. I notice that in the receipt, 26-C, which Mr. Malaby signed, he stated that he was acting as the agent for the South Pacific Wholesale (429) Company. I wrote it in there because that was the agent that sent me the whisky.

(Witness excused.) [144]

LESTER G. WILLIAMS

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Lester G. Williams, and I live at 486 Ellis Street (431) and recall a transactions early last year in connection with McHenry whisky. I first met Malaby in that transaction; and later met Morris and Nathan Newman; and later, Files and Schaeffer. Malaby came to my place of business and introduced himself, and told me he had

(Testimony of Lester G. Williams.)

whisky to sell if I was in the market for some. I knew there was a ceiling price on whisky. He told me to come to the St. Francis Hotel to meet the other boys, and he gave me a sample of the whisky—McHenry brand Blended. This was about March 1. I went to the St. Francis Hotel and there met the two Newmans and Malaby. We talked in general about the whisky situation, and they said that I would have to put up some money in order to get this carload of whisky out here, so that I could get my part of it. I think the price was around \$57 a case, and I was supposed to put up \$10,255 at that time on 500 cases. The ceiling price was not then discussed. The balance was to be paid by me when I received notice the whisky was there. I did not make any payment for several days. At the Hotel they told me, if I decided to put up the money, to go down to Files' office and he would handle the escrow arrangement through his brokerage office. It was three or four days after I had met them in the St. Francis Hotel that I deposited the money with Files. When I went to Files' office, Schaffer, Nathan Newman, and Malaby were there, and Mr. Files; and the deal was discussed along the line that this money was supposed to be put in escrow and if delivery was not made within ninety days I was supposed to have the money returned to me. The balance of the purchase price on the 500 cases was supposed to be paid on delivery of [145] the whisky in San Francisco. Later I signed a document, when I was with Malaby. I received a

(Testimony of Lester G. Williams.)

receipt from Files in regard to the \$10,255 when I put the money up. Files wrote the terms, that the money would be returned to me in ninety days if the whisky had not been delivered at that time. Later Malaby brought me another paper. This was a few days, or maybe a week or ten days after I had deposited the money with Files. Although Nathan Newman called my wife at home, a little later, and asked her if it was possible for us to put up the balance of the money, she said, emphatically, "no," and we never did put up the balance. As a result of the conversation I had with my wife, we did nothing more about it; but later I had a second call, on the phone, and Newman asked me for the balance of the money, and I said I was not going to put any more money until I received some merchandise (437). The ninety days finally elapsed, and on the morning of the ninetieth day I went down to Files and demanded back the \$10,255. I did not receive it right away. It took probably three or four days before I had received the full amount back. Malaby first gave me a payment of \$1135; and the second payment was made at Files' office by Nathan Newman, for the total of \$10,255. I never did receive any whisky.

(At this point, U. S. Exhibit 27 for Identification was marked.)

Cross Examination

By Mr. Cannon:

Mr. Cannon: Q. What was the date that you went to Mr. Files' office and met Files and Schaffer and Malaby and Newman?

(Testimony of Lester G. Williams.)

A. Well, it was right—all the time was tied in together. I don't remember the exact date. (438)

Mr Cannon: I might state to the Court the reason I am asking, if it was March 10, this is the first overt act you plead about in the indictment. You plead about an overt [146] act without further——

Mr. Licking: I am not quite certain that this particular transaction is not set out in the overt acts in the indictment.

Mr. Cannon: The reason I ask, it is along the line of the motion I have heretofore made and to the demurrer filed. It was alleged that overt act No. 1, on or about March 10, 1944, that the defendants Nathan Newman, Charles Malaby, R. H. Shaeffer, W. O. Files met at 309 Kearny Street, San Francisco, California, and (2) on or about March 11, 1944, the defendants Charles Malaby, Nathan Newman and so forth. No further details are given, and I want to know—I think I am entitled to know either now or sometime which overt act that is. I was wondering if this is the one, or do you know whether this is the overt act you refer to in No. 1? I believe I make myself clear to the Court.

The Court: Yes.

Mr. Licking: Well, for the purpose of argument if may be assumed it is.

Mr. Cannon: Then at this time I would like to have counsel indicate—or before he closes his case indicate—which of these overt acts applies to each witness. In other words, no details having been given as to overt acts, conversations or (439) meet-

(Testimony of Lester G. Williams.)

ings, no details having been given, we are at a complete loss to know what overt acts he is talking about.

Mr. Licking: Well, we will defer it. I take it under the law I have to prove only one of these overt acts.

Mr. Cannon: Surely.

Mr. Licking: If I don't prove at least one of the overt acts, then the case isn't any good. That is the way I am going to leave it. I am not going to say witness X is proving several overt acts.

Mr. Cannon: Or offer to prove it. [147]

Mr. Licking: No.

Mr. Cannon: If that is counsel's position and if the Court sustains him in that, I want your Honor to keep it in mind, because it will have a very material bearing in our motion in this case.

The Court: It may be that he won't resist your motion.

Mr. Cannon: Of course, we have heard of things of that kind. I want to call it to your Honor's attention, because there are no details given as to when a violation or an overt act occurred. (440)

Redirect Examination

By Mr. Licking:

I went down on the ninetieth day, and got my money. The only way I could establish a specific date would be to look at my bank account and see the time I deposited that money in the bank. The \$9000-odd that I got from Newman was paid in cash. I believe I deposited it the next day. I did

(Testimony of Lester G. Williams.)

not get any money on the ninetieth day; it was a matter of a week before I received my full amount of money. Malaby first came to the tavern and paid me \$1135. This was after the ninetieth day—probably the ninety-second day. That amount was deposited separately. Files was in his office when I came there on the ninetieth day. I talked with him. Shaeffer was there, but I had no conversation with him. Files said that Newman had the money. He did not say whether it was Nate or Morrie that had it. A few days later I received my money (443).

(Witness excused.)

PRIMO ROCCO

a witness for the government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Primo Rocco, and I am unemployed now. I did own a tavern in Santa Rosa. I am a defendant in this action, [148] and I have discussed the matter of taking the stand with my counsel, and I know that I do not need to testify unless I desire. I know that anything I say may be used against me. I know the defendant Charles Malaby. I do not know any of the other defendants. I am familiar with the factual bases leading up to this indictment, and the particular transactions involving Lichtenberg and Johnson, Enrico Barrotti, and

(Testimony of Primo Rocco.)

Charles Ferretti (445). I was first contacted by Harry Burnett, who is a contracting roofer. He came to my house with a friend of his, in April, I believe, of last year.

Q. What was your conversation with Mr. Burnett?

Mr. Cannon: I understand we have a running objection to this as being hearsay, and reserve the right to strike it.

Mr. Licking: Yes.

The Court: For the record, note an objection. Objection will be overruled.

Mr. Cannon: Exception. (447)

(Witness continuing:)

Burnett wanted to know if I wanted to buy some whisky and I asked him what he had and who he was working for, and he told me the International Import Company; but I do not remember the brand of the liquor. If I remember right, he said the price was \$57. I knew then that there was a ceiling price on it. He said the price would be \$57.50 in cash, of which I had to pay part at the time the order was placed, and then when the merchandise was delivered I was to pay the balance. I did not ask him what the ceiling price was. About a week later he came back. Later, John Costa asked me if I knew where he could get some whisky, and I told him that Burnett had been to my place. Costa asked me to bring Burnett over to Barrotti's place, and I told Burnett to go over; and I introduced him to Barrotti, later in April. No money was paid then,

(Testimony of Primo Rocco.)

and no documents were signed then. Barrotti gave an order for 200 cases. Later Barrotti paid some money over to me, while Burnett was present, because Barrotti did not want to give Burnett the money because he didn't know him; and Barrotti asked me if I would hold the money until he could investigate, and find out whether the Company was operating and was sound. I told him I would hold it. I had no agreement with Burnett as to any commission, and I did not retain any part of the money. Barrotti told me that when I was sure that he would get delivery of the whisky I was to turn the money over to Burnett. I did not know then what the ceiling price was, or how much was to be paid, or anything like that (451); but I did know there was a ceiling price. Costa had told Johnson about the whisky deal, and Johnson called me up and told me to get hold of this man who was selling whisky; and I told him the man had gone back to Oakland. He then told me to call him up and put in an order for 50 cases; so I called Burnett on the phone, and told him the man would have to have about 50 cases; and Burnett said that he did not have the gas, and to tell him to leave the money with me, and he would pick it up on his next trip. So Johnson brought the money over to me, and turned it over. It was something over \$1000, as I remember. Then Johnson brought Ferretti, (452) who only wanted 25 cases. Johnson made his deposit one day, and he came back the next day with Ferretti who bought 25 cases. Later on, invoices were executed, or receipts given. Burnett brought them. They were exe-

(Testimony of Primo Rocco.)

cuted after the money had been paid over. I was present when Burnett had these documents signed, but I did not see them actually signed. I gave Barrotti a receipt, shown in Government's Exhibit 16-A for Identification. Later I turned the money I had received over to Burnett and Malaby together. The [150] whisky had not yet been delivered, although some of the people in the bay area were getting deliveries; and as soon as I felt sure that they would get the merchandise, I turned the money over. That is what Barrotti told me to do; but Johnson and Ferretti told me to turn it over any time. They did not ask me to wait until I was sure that they would get their liquor. I did not get any receipt for the money that I turned over. There was no discussion between me and Malaby as to any payment I was to get on the transaction. After the merchandise came, Burnett got in touch with me. He had read in the paper that the State officers were condemning the liquor because the merchandise was not what it was supposed to be, or something like that (455). Burnett said the whisky was bum, and he said that I ought to tell them not to accept it. I saw them later but they had already received their stuff. I made an attempt to collect the money which had been turned over to me, and which I had turned over to Malaby, by contacting Burnett. I told him to come up and see the fellows; and I told Burnett to get in touch with Malaby. In my presence, Burnett called up the International Import at Los Angeles and asked for Malaby. I think I made two or three calls, and the last time I talked to Malaby

(Testimony of Primo Rocco.)

by phone, Burnett had called him, but I asked Burnett to let me talk to him—and he did. I told Malaby that Barrotti wanted his money, and he did not want any merchandise. I told him that if the money was not sent up I was going to see the District Attorney; and he told me that he would send it right up, and asked who to send it to. I told him that he had the invoices, and knew who to send it to. Two days later I got a notice from the Western Union that there was a money order up there for me. I went up there and a check for \$1000 in my name was there. I took it and turned it over to my attorney; I did not cash it (458). I did not see Malaby again after [151] that until I saw him in Court. The check and telegraphic notice of money order is marked U. S. Exhibit 28 for Identification. I have handed you an envelope addressed to me on the stationery of Burnett to the International Import Company, and a letter signed by Charles Malaby, addressed to Burnett. I received these from Burnett, and they are marked U. S. Exhibit 29 for Identification.

(Witness excused.)

CHARLES MALABY

a witness for the Government, being duly sworn, testified:

Direct Examination

By Mr. Licking:

My name is Charles Malaby, and I am one of the defendants in this case, and have heretofore pleaded guilty, after I had been advised of the nature

(Testimony of Charles Malaby.)

of the charge. I have heretofore been convicted of a felony, in 1928, for receiving stolen property, and I served time. I know all of the defendants. Government's Exhibits 22 and 22-A are photostatic copies of letters of authority to me from the International Import Company. I know Mr. Cain's secretary, Miss Anderson. She has been in and about the court and in the hallway outside the court during the last three days. The day before yesterday I had a conversation with her.

Mr. Ames: Your Honor please, I cannot see the relevancy of this in the matter. Miss Anderson is Mr. Cain's secretary; no question about that.

Mr. Licking: Miss Anderson is also, I am informed, to be a witness in the case.

Mr. Ames: Very possibly.

Mr. Licking: Well, you stated that to me and asked me to overlook the fact she had been in court here.

Mr. Ames: Correct.

Mr. Licking: And I said I would overlook it, and you [152] might call her. (461)

This is material, your Honor—there is no possibility of any prejudice; there is no jury here.

Mr. Ames: I was wondering what materiality it could have.

Mr. Licking: Well, I intend to prove that she attempted to dissuade this witness from testifying, and in that connection mentioned your client, Mr. Cain. I think that is quite material.

(Testimony of Charles Malaby.)

Mr. Ames: The question is here, what difference does it make?

The Court: It may or may not become material. I will allow it subject to a motion to strike and over the objection of counsel.

Mr. Cannon: I want to make the record clear. As far as Mr. Newman is concerned, I object particularly on his behalf in view of the fact it is something which occurred long after any plan or scheme in the indictment, and therefore under *United States v. Pettibone*, could not be admissible.

Mr. Licking: It is not admissible and not offered as to any of the other defendants, or as to the merits of the case. It is offered merely as to the interest or bias of this particular witness should she become a witness.

Mr. McDonald: Exception.

Mr. Licking: Did you have a conversation with her the day before yesterday? A. Yes.

Q. State what happened, how the conversation arose.

Mr. Ames: I object to all this line of testimony and note (462) an exception.

(Witness continuing:)

She walked out in the hall and moved her head for me to come over, and said, "Mr. Cain has two good lawyers in there to help you," and I told her I did not need any help, and that [153] I did not need any help, and that I had already pled guilty, and that was the end of the conversation. I had another conversation with her yesterday.

(Testimony of Charles Malaby.)

Q. State the occasion of that conversation.

Mr. Ames: The same objection.

The Court: Same ruling.

Mr. Ames: Exception.

The Witness: She said, "What do you want to testify for?" I said, "Why not?" She said, "Why don't you stand on your constitutional rights?" I said, "Why should I? I already pled guilty. Now, I am going to tell the truth." She said, "Mr. Cain has two good lawyers in there; they are going to tear hell out of you." I said, "I don't care. I will tell the truth and always tell it."

Mr. Ames: I move that all that testimony be stricken out as entirely superfluous to the record in this case; it proves nothing.

The Court: It has no relation to the merits of the case.

Mr. Ames: Nothing whatever. (463)

(Witness continuing:)

I have already pleaded guilty to a charge which, in general terms, is that I entered into and was party to a criminal agreement with the other named defendants for the purpose of selling whisky at a price over and above the ceiling price established by law.

My first associate in the matter was Nathan Newman. We talked in Los Angeles about going into the whisky business, and Newman said that he could go back east and get some whisky. That was Morrie Newman (464). I told him that would be fine. That was in January of 1944, I believe. We talked

(Testimony of Charles Malaby.)

several times, and then Nate and Morrie Newman and I came here to [154] San Francisco. My financial condition at that time was not very good. We came to San Francisco to see if we could get a wholesaler to handle the whisky that we were going to bring in from the east; but at that time we did not have in mind any particular brand or kind of whisky (465). In our efforts to get a wholesaler we met Shaeffer, whom I have known for many years; and I asked him if he could help me get a wholesaler, that we were going to bring some liquor in here. He told me he would try. I took Shaeffer up to the St. Francis Hotel and introduced him to Nate and Morrie Newman. They also asked Shaeffer to see if he could get a wholesaler. We fooled around about a week or so, and did not get a wholesaler. Meanwhile, I was looking around to see if I could sell some whisky, and I went to see Mr. Williams and told him we were going to bring some whisky here, and asked him if he was interested. He said he was, and would buy 500 cases if I could get it. I told him that I had two gentlemen with me and wanted him to come to the St. Francis and meet them. Up to that time I had not told him of any price. He came up to the St. Francis Hotel, and I introduced him to the Newmans; and we talked about the 500 cases of whisky. He said he would think it over and let them know the next day. The next day, he came back, I believe. At that time we did not have the McHenry Reserve whisky, but he was quoted a price which I believe was around \$52 or \$53. That quotation was given to him by the

(Testimony of Charles Malaby.)

Newmans and also by me. The next day after our first talk, he came to the Hotel and talked with Nate Newman, but I do not think I was present. After this meeting I talked with Newman about it. He said that Williams was going to talk it over with his wife, and would be back the next day. I was present when he came the next day, along with Newman. That was during the month of February, I believe. On this third visit he said that he was willing to buy the 500 cases, but wanted to know [155] where he could deposit the overage, which was the difference between the ceiling price and the price we were to charge him. That had been discussed between me, Nathan Newman and Morrie Newman. We had not previously discussed the method of payment of the overage, and we did not have anyone at that time to escrow the money with. Mr. Williams mentioned the necessity for some escrow holder. I then went to my friend Shaeffer, and asked him if he knew someone he could get to act as escrow holder, and he said he would speak to Files, and see if Files would consider handling it. Later Shaeffer told me that Files would handle it, but he did not want to know about whisky; and that when the people would bring their money in, they should not mention whisky, that they should leave their money, get a receipt, and walk out. Files did not want to know about whisky; nor to talk about it. Mr. Newman made the deal with Files, and my understanding is that Files should turn the money over right after the people had left it (470) at Mr.

(Testimony of Charles Malaby.)

Files' place. This money that was collected was used to finance our operation. At a later date, Williams and his wife, and I believe Newman, went to the office of Mr. Files. I was not there, but Mr. Files was. Later I talked with Nate, and with Williams, and with Files as to what occurred, and learned that something around \$12,000 had been turned over by Williams to Files; and Files said he turned it over to Newman. I do not remember whether Files said that in this deal he took out his commission; but he usually does. The commission which Files was to receive started, I believe, around 4%; and then he wanted 5%. That is what he was getting. There were other rewards talked about, but he never did get any. After the Williams transaction, the next one was with Goldstein, who told me he would like to buy a couple hundred [156] cases. I took him over to the St. Francis Hotel, and introduced him to Nate and Morrie Newman. The Goldstein transaction was maybe two or three or four days after the Williams transaction. During that period Nathan Newman and Morrie Newman were registered at the St. Francis Hotel under their own names; and they were up here about two weeks then. I introduced Goldstein to Morrie and Nate Newman at the St. Francis, and we talked about the deal for 200 cases. Goldstein said he wanted to buy very good liquor. He had been promised some liquor at that time by the name of Daugherty, or Doggerty (472). He said he would like to escrow the difference between the ceiling and the price

(Testimony of Charles Malaby.)

that we agreed upon. I think the price we agreed upon was \$55 or \$53. Goldstein made the deal with the Newmans. Later he deposited the overage with Files, but I do not remember the exact date. Government's Exhibit 26 for Identification, dated April 11, 1943—that is the date when the Goldstein order was signed. He might have deposited his overage; and we might have written the order afterwards. That happened in many cases; and April 11 on the order would not necessarily determine the date of the deposit. In the Goldstein transaction, we never did get the Doggerty whisky. We had made a contract with the McHenry, and asked him if he would take McHenry, and he said “no” that he wanted straight whisky; and he wanted to cancel his order. He did so. Before the car of McHenry whisky arrived Newman came to San Francisco and we went around and collected the ceiling on this liquor, for which we already had deposits with Files. Newman went to Goldstein and collected the ceiling of \$7280. He had also paid down some money to Files, as I recall something around \$4500. I paid him back \$4500 from money that I had collected from different sales that I had made, and some overages that I [157] had received, but not from money that had been deposited with Files. For a while all the money that Files received was to be turned over to Newman, and then I told Newman he ought to instruct Files to turn the money over to me in case Newman was not there, and Newman gave Files those instructions. Government's Exhibit 26-A for Identification is a receipt for the money I gave

(Testimony of Charles Malaby.)

Goldstein. I have the original but do not have it with me.

Q. Up to that time was the defendant Burt Cain in the agreement or picture?

A. No, he was not at that time.

Q. He was not at that time. When and how did he come into your picture?

A. Well, we were still trying to get a wholesaler, and Mr. Newman went back to Los Angeles, and I was still trying to get——

Q. Which Mr. Newman went back to Los Angeles? A. Nate. (476)

(Witness continuing:)

I was in San Francisco trying to get a wholesaler, but was taking orders. I phoned Los Angeles a week or two later and Newman told me not to try to get a wholesaler any more, that they had a wholesaler down in Los Angeles. Newman came to San Francisco and told me they had a wholesaler, and when I came to Los Angeles I would get my credentials and we could do a lot of business. I went to Los Angeles.

Q. About what time was that?

A. In March (476).

Q. You speak of getting your credentials. Did you get them on this trip to Los Angeles?

A. When I got to Los Angeles I went to the office on LaBrea Street, and they introduced me to Mr. Cain.

Q. When you say the office, what office do you mean? A. International Import Company.

(Testimony of Charles Malaby.)

Q. You were introduced to Mr. Cain at that time?

A. I was introduced to Mr. Cain, and he was very glad to see me. He [158] said, "I heard a lot about you, and I like you." (477)

(Witness continuing:)

Up to that time the \$12,000 collected from Williams and the \$4500 collected from Goldstein had been given to Newman, less Files' commission. The day that I met Cain we did not talk very much, but the next day I came back and we talked about the transaction, and I told Cain that I wished he would give me two letters of credentials, to show people that I was representing International Import Company; and he gave me those letters, and they are marked Government's Exhibits 22 and 22-A for Identification, and are dated March 22, the date I received them. I had arrived in Los Angeles a few days before that. The day that Cain gave me these credential letters we discussed the proposed plan of operations, while Cain, I, and Nathan Newman were present. Miss Anderson was not present at any conversation where we discussed the matter of overage or the general plan of operation. Those conferences were held in the back office, which is a little room where nobody could hear us.

Q. Did you disclose to Mr. Cain, or was Mr. Cain familiar with what had already been done, the fact you had collected the overage in these two cases?

A. He was familiar with it. (479)

(Witness continuing:)

(Testimony of Charles Malaby.)

On that day, we discussed the fact that Morrie Newman had contacted the Midvalley Distillery back east, and we were going to buy a franchise from them for \$2500 to handle their liquor in the State of California, and I was to come back up north and sell the liquor, or any other liquor that we could obtain. The overage that was collected was supposed to be sent down to the office in Los Angeles by Newman or by me; and when the money arrived in Los Angeles it was supposed to [159] be turned over to Mr. Cain. (479). Most of the overage money was turned over to Newman to take down to the office. I took money down to Los Angeles.

Mr. Licking: Q. Where in Los Angeles did you take the money?

A. I took the money this last time and give it to Mr. Newman, and Mr. Newman said he was going to take it to the office of Mr. Cain the next morning.

Mr. Ames: I move the last part be stricken out.

The Witness: How do you want me to say it?

The Court: Just a moment. You just answer the questions.

The Witness: Yes.

Mr. Licking: It seems to me it is a manner and method of carrying out a conspiracy.

The Court: This is a conversation by one of the alleged conspirators. The objection will have to be overruled.

Mr. Ames: Outside of the presence of the de-

(Testimony of Charles Malaby.)

fendant Cain, to whom this is supposed to relate, your Honor. It is hearsay as to him.

The Court: Mr. Cain would not have to be present with another actor in this conspirator so charged.

Mr. Ames: That remains to be seen. I will except to your Honor's ruling.

The Court: I am indicating to you my state of mind so you won't be taken by surprise. Proceed. (481)

(Witness continuing:)

There was \$10,000 deposited to Cain's account for the International Import Company, and that \$10,000 was given by Newman, and was from Spenger's overage, to pay for the car of whisky, in part. There was a discussion by Cain, when I got my credential letter, as to the price at which I had been soliciting orders in San Francisco. I told him I was getting \$55 to \$57 a case and that maybe I could get \$60, and he said [160] that was fine, but to be careful (483). Exhibit 8-A for Identification is an order which I believe Lowenthal took. These orders that we used had three copies each, a white, yellow, and blue. Government's Exhibit 26 for Identification is a receipt for money, and we used three different colors on that, just like the other—a white, yellow, and blue. One was for the salesman, one was for the office, and one was for the customer. At the time I got my credential letters from Cain, I was also given some stationery such as order blanks and other things; and then

(Testimony of Charles Malaby.)

I came back to San Francisco, and continued in the same line of activity as theretofore. Morris Newman was in Los Angeles. He was the buyer for the company and the general purchasing agent, and was the man who went back east and made the contract with the Midvalley Distillery to buy McHenry Reserve whisky and McHenry Special, and whatever other brand they make (485). Later I received some samples of McHenry whisky. It was a half a case of pints and a couple of fifths. I met Pete de Georgis of the Miami Inn a couple of months previous to this deal. He was the manager of a club in El Cerrito, and he gave me an order for 100 cases at \$49.50 a case. The ceiling was \$36.40 at that time, but they corrected it to make it \$36.19. He gave me the balance of \$2000 in cash, which \$2000 I turned over to Newman in San Francisco. Government's Exhibit 9 for Identification, which has the name "Charles Malaby" thereon, is not my signature. The ceiling on this order was collected by Mr. Newman while I was with him, but I do not know whether or not he signed my name to the order. At the time the ceiling was collected the receipt which we had given to Mr. de Georgis for the overage, was also collected. Newman got that receipt and tore it up. I recall a transaction with Martin Fuchslin which is embraced in [161] Exhibit 2 for Identification. McKinnon told me he took an order, and told the man to go to Files' office and deposit the money; and I asked Files if he deposited the money there

(Testimony of Charles Malaby.)

and Files said he did. A couple of months later I went to his place and signed an order for the whisky. That is Government's Exhibit 2 for Identification. McKinnon secured the original order and I secured the execution of the other copy, and got the payment at that time of the ceiling price; or rather, we did not collect the ceiling price until the whisky was on the way and ready to arrive. But we later collected the ceiling in the transaction. When they went to collect the ceiling, Newman asked Fuchslin for the receipt which Files had given him, and Newman got that receipt and tore it up. I recall a transaction in which a man named Becker, at the Red Raven, was contacted by McKinnon. He gave McKinnon \$300, and McKinnon took it down to Files and deposited it. I went to see this man afterwards and gave me some money in cash, but later on he cancelled his order and I got the money from Files and took it back to him and gave it back. I recall that Mr. Lowenthal contacted Mr. Thomason (488) and he brought him over to Files' office. I met Lowenthal there along with Mr. Thomason. Files was not there but the secretary was. We waited a little while and I asked her if she would call Mr. Files, and she did, and said there was a man there who wanted to deposit some money and he can't wait. I asked him if I could take the money and sign the receipt, and Files told me to go ahead, and I did. Government's Exhibit 7-A is the receipt I signed at that time. That receipt represented the overage, and

(Testimony of Charles Malaby.)

I later executed and caused to be executed the usual invoice and receipt reflecting the ceiling transaction. Exhibit 7-A for Identification are those papers, and the amount reflected in the invoice was collected by Mr. Newman [162] and I collected the receipt along with Mr. Newman, from Mr. Thomason's ex-wife, when she paid the money. Mr. Lowenthal contacted Elliot Smith and went over there several times, and finally asked me to go there, and I did. I met Lowenthal and Navinger (490) and we talked to Smith. Smith had the money for the overage and gave it to me. The deal had already been made, and Newman and I went over and got the money by certified check, as shown on Government's Exhibit No. 18 for Identification. I recall taking the cash from Gibson and Smith for the overage, but gave them no receipt. That cash was all ready, because Lowenthal had arranged the deal. I recall a transaction with Pete Reali. Benson introduced me to him, and made a transaction for 20 cases. I collected the overage and Newman and I went back and got the check for the ceiling, and caused Government's Exhibit 10-A for identification to be executed. Reali did not ask for any receipt for the overage. I recall a transaction in Stockton with a man named Vincentini (492). He came to San Francisco and ordered some liquor and I took him down to Files' office and he deposited, I think, \$2100, and owed about four or five hundred dollars. I went to Stockton and he paid me that money. That was

(Testimony of Charles Malaby.)

overage. The \$2100 he deposited with Files was not sufficient to pay the overage on his order. The overage amounted to around \$2600. We did not adhere to any set price for the whisky. I gave him a personal receipt for \$2100, but I forgot to take it away from him when he went to Mr. Files' office. But the \$2100 shown in my receipt is the same \$2100 that he deposited with Files. Files gave him a receipt. I did not know anything about the circumstances under which the promissory note shown in Government's Exhibit 3-A for Identification was given. I recall a transaction with Guy Caputo (493). I talked with him and he came to Files' office and met Newman, [163] and bought 500 cases of liquor, for which the order blank was executed, and no cash was paid down. The photostat copy of a receipt signed by Mr. Files is for \$12,350, and covers the overage that he paid to Mr. Newman. I also recall similar transactions up in Sonoma County in which Primo Rocco acted as intermediary, along with Mr. Burnett. A friend of mine by the name of Miller introduced me to Burnett and I gave him my card, reading, "International Import Company." He said he was in the construction business and that he went around little towns up the State, and I told him if he knew anybody that needed any liquor to let me know and I would appreciate it. About a week later, he said that he had a friend in Santa Rosa who had some friends that needed some liquor, and I told him that he could go ahead and tell them to

(Testimony of Charles Malaby.)

deposit the overage, or give him the overage, and that he could bring the overage to me or I would go over and get it. I did not see him for four or five days, and then he came back and told me that there was a man there by the name of Rocco who had collected some money off of a friend, which money had been deposited with him for liquor. I told him I had no time then to go over to get the money, but that I would go in a couple of days. In a few days he took me over and I met Rocco, and told him the price was \$60. Rocco said he had told his friend it would only be \$57, and I told him to let it go at that. Then Rocco gave me the money that had been paid for the difference, and I took the money and came back. Later, when the whisky was coming in, I met Burnett and I told him to go to the Palace Hotel and we would give him the order. He went to the Palace Hotel and Mr. Nathan Newman and I wrote up the order, and Newman asked me to go over to Santa Rosa, to Boyes Springs, and other places, and collect the money for the ceiling. I told him I had no time, and [164] that I would give it to Burnett, and that he would do that. So we wrote up the orders and gave them to Burnett and he took them over and brought back the ceiling checks (496). Exhibits 15, 16, and 17 for Identification are the documents—except the receipt on the first one, which I turned over to Burnett to take to Sonoma County to have executed. They were made up at the Palace Hotel by Nate Newman. After

(Testimony of Charles Malaby.)

the Williams' and Goldstein's transactions I went to Los Angeles and it was then the defendant Bert Cain came into the picture (497), and I got my connection with the International Import Company. I made another trip to Los Angeles. I used to go down there every couple of weeks in connection with the operations we were in, and to visit. On those occasions I talked with Cain about the business; and on different occasions we discussed the different amounts of overage that had been collected. Once we talked about the disposition of the moneys with regard to the cost of the car of liquor which was being purchased in the east. Cain and I were present. He said the car cost \$72,000, but the ceiling price, I think, was around \$44,000 or \$45,000. The money to pay for that car came from the overage we had been charging these people. When Nathan Newman and his brother and I went into the deal, in the first place, the financial condition of the three of us was not good. We did not have enough money between us, or property, to buy a carload of whisky. Mr. Cain told me that his financial condition was not very good (500). He did not give me any statement of finances or anything of that sort. He said it cost him some money to buy the license, and he hadn't any more money left, hardly. The franchise cost \$2,500, and it was paid to the Midvalley Distillery, and the money came from the sales I made of whisky; from the overage (501). I recall a transaction with a man named Di Silva. It was made through Lowen-

(Testimony of Charles Malaby.)

thal [165] who collected the money, and I went to his house to check up with it, and he told me about it and gave me the money. Subsequently I caused the invoice and the receipt, shown as Government's Exhibit 25-A for Identification, to be made up. Newman and I collected the ceiling. Di Silva did not have any receipt for the cash payment. Lowenthal collected the cash himself, and turned it over to me. It was not very much; it was for only 8 cases. I remember a transaction with Amaro Pitta whom I first met in San Francisco and we talked about liquor. He said he was interested in buying 100 cases of bonded liquor, so I brought him over to Files' office and he deposited \$3200. Government's Exhibit 14-A is the sales slip that was executed at the time. Later he ordered 25 cases of McHenry Reserve, and Government's Exhibit 14 for Identification was executed at that time. The first transaction was for 100 cases of McHenry Bourbon, 100-proof. We had been promised whisky of that type, too. The overage was \$3200. Exhibit 14-B for Identification is a note signed by Files and Shaeffer, but I do not know anything about the circumstances of the execution of that note. I was present at the time Pitta paid the deposit at Files' office. Exhibit 14-D for Identification was executed at that time and given to him. I remember the transaction with Margaret McNeil (503). A friend of mine called me one day and said that he was in a place called the Big Boy Barbecue, and in there that

(Testimony of Charles Malaby.)

Mrs. McNiel had said that she needed some whisky; and had already given an order for it. I asked for the woman's name and phone number and address, and I called her up and she told me she had given the order to Oscar Lowenthal, who said he represented me. She said she had given an order for 200 cases. So I went over to see Lowenthal, and he told me he took the order. I told him that she claimed that she had [166] given him \$5300, and he told me she had. I asked him where the money was, and he told me he had it in a safe deposit box. When I asked him why he did not turn it over to me, he said that she had told him not to. So I asked him to go over and see her with me, and we went over together, and when I asked her if she had told this man not to turn the money over to me, she said she had not, and so told him, and wanted him to turn it over. He then said that that was not true, and that she had told him not to turn it over, and they argued back and forth. Finally she said that she wanted her money back. So Lowenthal and I left, and he said that she said not to turn the money over to me, and that that was why he had not turned it over to me, and that he was not going to turn it over. So I had a long talk with him, and finally I called Mr. Newman, and Newman said that he would come down. That was Nate Newman. I had called him at Los Angeles. Newman came to San Francisco, and we met with Lowenthal, who said that he would pay over the money but he did not have

(Testimony of Charles Malaby.)

it all at that time. The next day Newman and Lowenthal met, and I believe Lowenthal gave Newman some money, but I do not recall exactly how much. Lowenthal said that he would go out in the country where he was interested in a show and get some more money. So we drove out that evening—that is, Newman, Lowenthal, and I. Out in the country Lowenthal collected \$500 from the show and turned it over to Newman; and that is all I know about the transaction. The money was never turned back to Mrs. McNeil. We got the order of 200 cases and delivered to her 50 cases. Government's Exhibit 8 for Identification is the invoice connected with that transaction. Mr. Cain had been up to San Francisco a couple or maybe three times, up to the time of the McNeil transaction. I do not remember the months when he was in San Francisco, but he was here one time when [167] Cardinelli came up there to the Palace Hotel. I do not recall the date. Cain was not at the Palace Hotel when Burnett was there and got those slips. I recall the transaction with Nello Nomellini (505) and Luigi Di Ricco. I engineered that and took that order and took it down to Files and there deposited the money. I do not recall what they deposited with Files. They refused to take McHenry whisky and I switched it to somebody else. Newman and I went to collect the ceiling, as shown on Government's Exhibit 12 and 12-A for Identification. I had theretofore collected the cash for the overage. It was deposited

(Testimony of Charles Malaby.)

with Mr. Files while I was there. They had a receipt for it, and when we went to get the check for the ceiling we always asked them for the receipt, and we got the receipt back. The moneys deposited with Files under the escrow agreement did not remain in his office at all. As soon as the customer walked out, he was supposed to turn it over, and did so. Sargiani (507) had an order for 50 cases and then he changed his mind. He said he had a chance to buy other whisky, and wanted his money back, which was the overage. He deposited his money with Files with two other gentlemen.

(At this point U. S. Exhibit 30 for Identification was marked.)

(Witness continuing:)

I remember a transaction with a man named Cardinelli (507). I was in Richmond and met a friend of Cardinelli's who told me that Cardinelli might need some liquor, so I left my card. I heard nothing from him for about a week. Later Cardinelli called me and I met him at the Sutter Hotel, in San Francisco, and he gave me two or three orders, one from Pittsburg and a couple from Richmond. He said he had the money for the overage there, and he gave me around \$5000, or more. I gave him a [168] receipt for it, and then when the liquor was coming he wanted the invoices so he could give them to these people. I told him to come over, as Mr. Newman was there. He came

(Testimony of Charles Malaby.)

over and we went to the Palace Hotel. I told him that Mr. Newman and Mr. Cain were in the city now, and that I would introduce him to them, and that Newman would make out the invoices. Then I brought him upstairs and Newman made out the invoices, and after he had made them Newman asked me, "How about the other money?" and I said, "I got it all right." When we had this conversation about the other money, or the overage, Cain was in the room, not very far away; maybe four, or five, or six feet—something like that. I walked out with Cardinelli and I did not go back, so I do not know how long Cain stayed there. He was supposed to be rooming at the Palace. He stayed in the city a couple of days. On that trip I discussed with him the progress of my affairs, and told him how well we were doing, and everything was lovely. Nothing was said about any overage collections that had been sent down to the firm. On another occasion, Newman, Cain, and I were at the Palace, but I cannot fix the exact date (509). I think it was about the time of the Kusalo, Porfido, and Bryden (510) transactions. I had made certain collections and had some money with me. Newman and I had crossed the bay and we signed up three or four orders, including Figone and Bryden; and I think we had the money with us then. We came back quite late and went upstairs, and Newman said that we ought to split the money. We collected about \$2500 overage money, and I told Newman that I had spent about

(Testimony of Charles Malaby.)

\$1100 buying a few cases of liquor for those customers, and I wanted to take that out, and he said, "All right, take it out." So it left \$1500. He gave Cain \$500, and me \$500, and kept \$500. The two checks from Kusalo, dated 5/25/44, one check for \$691, and the other [169] one a check to the International Import Company for \$868, are marked Exhibits 11, 20 and 20-A for Identification. That is the date of the transaction. Kusalo had already cashed his own check and given us the cash. On that same day Newman and I were collecting the ceiling. We had gone to collect the ceiling from de Georgis, and he had told us about these two other people. We went to those two places, and collected the ceiling and the overage at the same time. That is the date when the three of us were at the Palace Hotel, on May 25, and the date when we split the \$1500 up into three equal parts of \$500 apiece. Government's Exhibit 18 for Identification are the papers dated May 23, 1944, executed in connection with the Elliot Smith transaction, on account of whisky to be delivered. It must have been a month or two, maybe more, before this date that we had collected the overage. April 8 is the date that I wrote the order, when I was taken there by Lowenthal. I collected the cash overage at that time, on April 8. At that time I received \$1480.50 (515). Newman was not there at the time. He was there with me when we collected the ceiling.

(At this point Government's Exhibit 18-B

(Testimony of Charles Malaby.)

for Identification, an order blank with the heading "International Import Company" identified by the witness, was marked.)

(Witness continuing:)

I recall a transaction with Martin Fuchslin, originally contacted by McKinnon. Government's Exhibit 2 for Identification is the paper which was supposed to have been executed by McKinnon, and the first paper is dated May 9, 1944. The other papers bear the date 5/23/44, and I executed them myself. Newman and I went there and we got the check for the ceiling and we asked him for the receipt that he had for the money, and he gave it to us. This covered the overage. I recall a [170] transaction with Nomelini (517). I made the first contact. I took them down to Files' office and they deposited their money and got a receipt for it. Files was there and his secretary, although she was not there when the money was deposited. She was outside. Because, when they deposited their money they went into a private office. At that time I secured these documents, Government's Exhibit 12 and 12-A, which cover the ceiling transaction. I remember the Manuel Costa transaction. I contacted old man Costa and he ordered 50 cases, and gave me a check for it. A few days later Newman was in San Francisco and we went out there. The check which he gave me was for the ceiling. When Newman and I went there the liquor was pretty near Los Angeles and we went out there to collect.

(Testimony of Charles Malaby.)

We stopped to see Costa and his son was there and he gave us another order for 50 cases of McHenry Reserve, and gave us a check for the ceiling and the overage in cash. Government's Exhibit 13 for Identification refers to the second order. I recall a transaction with Pitta (519). I was introduced to him in San Francisco and he said he needed 100 cases of bonded liquor and I told him I could supply him with it, and made an arrangement and took him down to Files' office, and he deposited \$3200. I do not know whether Files was there at the time or not. Exhibit 14-B for Identification is the receipt given for the payment of the overage; and the other document, Government's Exhibit 14-A is for the order of 100 cases. Later there was an order for 25 cases. I do not know anything about Government's Exhibit 14-C which is a note. In the transactions that were had with Lichtenberg and Johnson and Perretti I have already identified the order blanks, and said that I had given those order blanks to Burnett with my signature already on them, and that Burnett handled the transactions. I have also [171] identified the McNeil transaction, and the one that I had with Vincentini, in Stockton (521). At the beginning, Benson handled the Frank Spenger transaction, and introduced me to Spenger; and I went out there and made a deal. An order for 500 cases was given and we came over to Files' office. Spenger deposited a check with Files, but Files did not want to cash the check and asked me if I would cash it. I took the check to Mrs. Schilling

(Testimony of Charles Malaby.)

and asked if she would cash it for me. She put it through her bank, and two or three days later she met me and gave me the cash, and I took the cash to Files. He took his 5 per cent and I kept the balance (521). Government's Exhibit 4-A, the check, is the one I was discussing. It bears the signature of Mrs. Schilling, who cashed it. The balance, after Files took his 5 per cent, I took to Los Angeles that night or the day after. At that time I forgot the order of Spenger, and I asked Benson to go out and get that order and send it to Los Angeles to the office, because I was in a hurry. Benson did so, and he put it in a letter and sent it to Mr. Cain. It is an order for the liquor; for the 500 cases. Government's Exhibit 4 for Identification is the order.

Mr. Licking: Q. Did you give Mr. Benson any directions?

A. Yes. I said, "You get that order from"—

Mr. Ames: I will object to that, if your Honor please, as not binding on any of these defendants. It is hearsay.

Mr. Licking: If the Court please, this is a direction to a co-conspirator. (523) * * *

The Court: * * * The objection will be overruled. Proceed. (523)

Mr. Ames: Exception to the ruling. (524)

I told Benson that I had forgotten to get the order from Spenger and I left it over there and I asked him to go and get [172] it, and to mail it to the office, to Mr. Cain. And Benson put it in

(Testimony of Charles Malaby.)

a letter and sent it down there, to Los Angeles, where I was when the letter arrived. Mr. Cain opened the letter and read it and asked, "What does Benson have to do with this deal?" I told him—nothing, but that he simply helped me out on it. There was a letter of transmittal with the blank that came down to Cain at that time, and the letter written on the Hotel Stanford stationery is that letter. I was not present when the letter was received in Los Angeles. I came in afterward; and the letter was discussed between Cain and me, in the offices of the International Import Company, about May 3. Nate Newman was there. Maybe Morrie Newman was there, too, but I am not sure. Cain said that he got a letter from Benson this morning and an order for 500 cases, and asked what Benson had to do with the 500 case order. I told him he had nothing to do with it, that he just helped me out, and he introduced me to Spenger. And I said, "That is the order that got the money in." I am certain that I discussed that with Mr. Cain and Mr. Newman. I am sure that they knew it was an overage payment that had been collected.

(At this point the document—letter—was marked U. S. Exhibit 4-B for Identification, and attached to other Exhibits bearing No. 4.)

(Witness continuing:)

There was a transaction with Robert Thomason

(Testimony of Charles Malaby.)
which is reflected in Government's Exhibit 7-A and 7 for Identification, and dated April 4.

(At this point, U. S. Exhibit 7-B for Identification was marked.)

Cross Examination

By Mr. Ames:

I live at 805 Bush Street in San Francisco with my wife. [173] When I am in Los Angeles I live in different hotels; sometimes my wife is with me and sometimes she is not. My wife's name is not Selma. Selma Malaby registered as Mrs. Malaby, but I never lived there. I used to go there, where she used to live. I did not live with Selma Malaby as man and wife when I was in Los Angeles, at her place of residence. In January and February, 1944, I lived at 1232 Maryland Street, Los Angeles (529). The conspiracy about which I have testified started about that time in San Francisco. I stopped at different Hotels in San Francisco. Most of the time my wife was with me. I was at the Victoria Hotel at the time I was picked up and booked as a thousand-dollar vag (529). I was at the Fairmont Hotel and an officer came up and took me and Mr. Nate Newman down, and we were booked, and we were released in three hours. I was convicted of felony in 1928. It was for receiving stolen property, and I got five years probation. In June, 1932, the same charge of receiving stolen property was brought up, and I was convicted and went to San Quentin. That is the Judge revoked

(Testimony of Charles Malaby.)

my probation. I was working for the Police Department, and he said that I had no business to mix with other people and he revoked my probation, and sentenced me as prescribed by law on the original charge, of 1928. I was held one day as a witness in Portland and happened to be in a place where there was a fight, and they took two or three people, including me. There was nothing serious, and nothing to amount to. I do not recall at all that I was found guilty with a thirty days suspended sentence in Portland, on January 17, 1935 (532). I have been arrested in Los Angeles once or twice. I was held as a witness for two days. I was a whisky salesman up until this trouble came, in July, 1944. Since that time I have not done very much. I have been waiting to collect my commission, and so [174] far waiting for that car of whisky to come in. I was waiting to collect my commission from Mr. Cain, the International Import Company, who I claim owes me a commission at this time. I think it amounts to about 5 per cent on \$140,000. I have not done much since July, 1944, although I try to do a few things to make a living, such as mining and different things, or selling a mine, or doing something. I have been trying to sell liquor. I have been trying to do it in the same way as I had been doing it before July. Since July I have not been collecting overages of the same sort I did prior to that. I have not collected some \$25,000 on a liquor sale as late as December. I do not know that there is a war-

(Testimony of Charles Malaby.)

rant out for my arrest on grand theft from Los Angeles County in connection with any such transaction. I never did collect about \$25,000 on liquor transactions in the same fashion that I have testified to in this case; and I did not pay back all but \$8,000 of it. Prior to going into this whisky business I was handling mining, selling real estate, and trying to do anything I could to make a living. I was never employed by anybody, only by the Police Department and the sheriff's office. I was under-cover agent for about ten years or more in Los Angeles, and I worked for the sheriff's office for two years as under-cover agent, and I was paid for it. I first met the Newmans around the first part of last year, but I had not known them before. I met them through their sister, Selma, when I was working on a certain real estate transaction. My financial condition was not very good then. The Newmans and I figured to make a business out of collecting money and later delivering whisky. Mr. Newman was to go east and make a connection to get whisky from a distillery, or wherever he could buy it; but he did not say what connection, nor with what distillery. At no time did we have [175] any connection with a distillery called Midvale Distillery. (536) I never did collect anything from Williams or Goldstein, but Newman did, and the money was deposited with Files and was turned over. Files paid the money to Williams. Newman had given him the money, which money Newman

(Testimony of Charles Malaby.)

had received from me, and Files paid it back. I paid him back \$1235 which I had received from other sales that I made, although I do not recall right now whom I had sold. When I had to put up money for another man, I went and made another sale and collected more money, and turned that over; and the \$1235 in money that I paid back to Williams, I collected from somebody else. I didn't keep hardly any money out except my expense, of say \$50 or \$100 a week, or whatever I needed. Whatever the Newmans allowed me to keep, I kept; and if they allowed me \$100, I kept \$100; if they allowed me \$50, I kept \$50; and the only money I got was what the Newmans chose to dole out to me. I never at any time got any other money than that. As soon as the money was collected, Files delivered it to Newman. I did not receive any of the money from Files until about two or three transactions. Nate Newman instructed him that if he was not here, to turn the money over to me. That was three or four months afterwards. I got \$10,000 of the Spenger money and took it to Los Angeles, less the 5 per cent that Files got. After I got to Los Angeles I gave that money to Newman, and he told me he was going to take it to the office the next morning. I never saw the money again. When I took the Goldstein money Morrie Newman said he could get Doggerty whisky from Philadelphia, or some place. Doggerty whisky was never shipped from the east to California to fill that order. Morrie Newman said he

(Testimony of Charles Malaby.)

could get the whisky, and asked me to take the Goldstein order, and U. S. [176] Exhibit 26 for Identification is that order. I did not spend all of my time up in San Francisco. I visited Los Angeles every week or two weeks. Later I delivered some Rocky Springs whisky that had been bought by the International Import Company and sent to Mr. Goldstein because he cancelled his order and they made a deal with him that they would send him 10 cases of some kind of whisky every week or give him his money back. I signed all orders that were taken here in San Francisco for the International Import Company, and they instructed me from the office to go and pick these ten cases up, and I went and got it. I did not collect the \$4500 from Goldstein. I did not have my hands on it. I was instructed from the office to pay him back. Cain and Newman instructed me. I do not recall when it was that Cain instructed me to pay Goldstein this money back. I was called from the office several times before the date on exhibit 26-A, because Goldstein had been bothering Cain all the time. Goldstein wanted his money back, so they told me to try to pay him his money back; that is, Nate Newman and Cain told me that. Cain told me this when I was in Los Angeles. Cain did not give me the money, but I got the money from different sales I made in San Francisco, as that is the only way that I could pay it back. The only money that the office gave was Caputo's \$5000 and \$1000 to Rocco. That was taken from money I had sent

(Testimony of Charles Malaby.)

down there, and which money was produced from overages from other customers. I gave it back to Goldstein, even though I had not received it because I was working for the Company and I had to take care of whatever they instructed me to do. The Company paid me 5 per cent commission for all of this. It was to be paid on every case of liquor, as soon as it was paid for. I was [177] supposed to get my 5 per cent immediately after the order had been taken, and the money had been delivered; but I did not take it out. Defendants' Exhibit D is the arrangement that was made afterwards.

(At this point Defendants' Exhibit D was offered and received in evidence.)

Defendants' Exhibit D reads as follows:

"I, Charles Malaby, hereby agree to work for you as a salesman selling whisky on a 5 percent commission of the OPA ceiling price to the dealer, payable at the time you have received full payment in cash from said dealer, and said merchandise so sold has been delivered to you in Los Angeles, California, by the distiller whose merchandise I have sold for you."

The next paragraph has no bearing here. The last paragraph:

"I also agree to obey any and all Federal, State, and listed rules and regulations covering the sale of liquor by wholesalers and importers."

(Testimony of Charles Malaby.)

Signed, "Charles Malaby," and "Accepted by the International Import Company." (544)

(Witness continuing:)

I signed that and agreed to its terms. I had a letter from Cain around July 18, asking me to resign. I was not fired. I was asked to resign on July 18, I believe. I do not have that letter, but I can produce it. Prior to that, he called me into his office and told me it was going to look very bad if I stayed working for the office and said that he thought I had better write a letter so that he could have it on record to show the law that I meant all right. He knew I was collecting overages all the time. I left the International Import Company in July, [178] around the 18th (545). I was with the Company from March 22 to July 18. When the newspaper in San Francisco broke about this trouble, I was in Los Angeles, and had several conferences with Cain every day. I cannot remember when I had the first conference with Cain. At one of these conferences, Cain did not tell me that he did not want anyone around the place who was violating the OPA regulations. We had a meeting one day, and he said that the ATU was checking up and it was going to look bad for him, and that we had to keep him in the clear; and it would be better if he wrote me a letter and asked me to resign until this trouble was over. First, we told him we would not resign; and then later I told him it would be all right to go ahead and write such a letter. I imagine this was around in July, because

(Testimony of Charles Malaby.)

Mr. Cain went east at one time; but I do not recall the date (547). It was after Cain returned from the east. The money that was collected from Williams and Goldstein was kept to buy whisky for the International Import Company. It was kept by Nate Newman but I do not know where. At that time the two Newmans and I were looking for a wholesaler because we had to have a wholesaler to put the whisky through. In the meantime, about \$16,500 was collected in a transaction that was consummated by Nate Newman. I did not have any connection with Midvale Distillery, myself, except that I wired \$2600 to Harry Hornstein (548) who was a connection man for the Midvalley Distillery. I was told from the Los Angeles office to wire the \$2600, and I did wire it from San Francisco. I got the money from a sale I made; from an overage that I had collected from somebody else. That was done at the direction of the office in Los Angeles. I talked with Newman about it. Hornstein was the go-between. I was not [179] told what this \$2600 was for. I believe it was owed on borrowed money for overages they paid for the whisky, although I don't know. The purchasing agent, whoever bought the whisky back there, paid the overage. He was Morrie Newman. I could not prove that he paid any overage to the Midvale Distillery, but there was money supposed to be paid to the Midvalley. I was told in the presence of Mr. Cain and Mr. Nate Newman that they paid \$14 overage for that whisky. That was told to me on many occasions. I

(Testimony of Charles Malaby.)

told them that was too much, to try to reduce it a little bit, and they said that they might try to reduce it a couple of dollars. Nate Newman and all of us talked about that, but I do not recall the date. Every trip I made to Los Angeles I went to the office and we talked about something. I was told the \$14 a case overage was paid to the distillery. Nate Newman and Cain told me that that money was supposed to be paid. Cain said that he was paying too much overage. My story is that they were going to pay \$14 a case to Harry Hornstein overage to the distillery. Morrie was the one who negotiated the deal back there. I do not know the price of this whisky from the Midvale Distillery (552). I was told it was around \$21 or \$23 or something like that. Then they figured the freight and the tax. I talked with Cain and Nate Newman concerning the type of whisky. They said it was going to be blended whisky, and also told me they were going to have some bonded bourbon whisky, and rye. Cain and Nate Newman told me that. Morrie brought some labels with him. Cain said that they were going to have some bonded whisky, at the time Morrie came back and brought the labels with him. I think the ceiling on the bonded whisky was \$68. I understood the Importing Company was going to pay \$14 over the Distillery's ceiling, which was around \$21 or \$22. Then to this total price, there was to [180] be added 80c for freight, and \$1.92 for sales tax in California, which would bring it up to about \$39 a case, which was more than the ceiling; and in addition to that we were going to

(Testimony of Charles Malaby.)

sell it for \$57, \$60; and I was selling for \$63. I was told to disregard the ceiling price. I was also told that we would invoice them for the ceiling and get as much as we could for it. Cain told me that several times when he and I were alone in the back room in Los Angeles, but I could not say when it was. It was before he went east. I went to work for him on March 22. He did not go east until this trouble came up, I think. He went east to get whisky when the newspapers came out with all the trouble. This conversation that I last mentioned was between March 22 and the time when Mr. Cain went east. It was in Los Angeles. We were just talking about the prices and different things and he said I should sell, or get as much as I could for the whisky but not to go over \$60, if possible, because we did not want to make different prices to everybody; and he was going to try to charge everybody the same price, around \$60 (556). Cain did not have to give me any instructions, with reference to the handling of the cash because he knew the sales manager collected all the money and I turned all the money over to Mr. Newman. He gave me no instructions about that. I collected all of this money and turned it over to Newman; and that was the habit in every single transaction that I had (557). I turned everything over to Nate Newman except for a little bit of expense money, which amount was determined by myself and Mr. Newman. The only thing I was to get out of the

(Testimony of Charles Malaby.)

transaction was 5 percent as a commission, and half of what the Newmans got. They were supposed to get 50 percent of what Cain got. I was to get 5 percent from the International [181] Import Company and part of what the Newmans got because they were supposed to get 50 percent. The Newmans were to get half of the profits that the International Import Company made on the transactions. This was discussed by me, Cain, and Newman (559). I was to get 5 percent commission from the International Import Company on all of the sales that I made, and then I was to throw my 5 percent with their 50 percent; and then we were to split that three ways, between the two Newmans and myself. In other words, Nate Newman would get one-third, Morrie Newman would get one-third, and I would get one-third; and Cain would get the other half. We did not have a chance to figure anything because when I went to Los Angeles the last time this trouble came up and then there wasn't any money or any whisky. They had \$16,000, I believe, in the bank, or something like that. We sent \$5000 to Caputa; and we sent \$1000 to another man. There was other expense, and I don't know what there would be. I got \$650 myself while I was there (560). The overage was supposed to be included in figuring the profit. I never had anything in writing to the effect of the division of these profits. I had no receipts, no books of account, and no memorandum with reference to what I did (561). Cain handed me the letter of May 3, 1944 to read and I

(Testimony of Charles Malaby.)

read it (562) and put it in my pocket. It is marked 4-B for Identification. He also handed me two or three other letters from Mr. Benson. It is not a fact that I stole it from his desk before he ever saw it. I had it in my possession at the beginning of this trial. I did not steal it. I remember a conversation in the office of Mr. Mathes on January 13, 1945, when Cain and Mathes were there. I did not say that I had stolen this letter, but I said that I had a letter that Cain had given me. I did not at that conversation state [182] that I had taken the letter. At that conversation I told Cain and Mathes that Mr. Cain had given the letter to me. I do not remember the date that I was first arrested in connection with these transactions, but we were but we were arrested in the International Import Company office. Mr. Cain was there at the time that we were arrested. I believe it was in June. Mrs. Anderson was never present at any conference that I had with Cain. Mrs. Anderson was not always in the same room when I talked with Cain; but anything we wanted to talk over confidentially we always went in the back or upstairs. After I had been arrested I desired to hire an attorney, and I spoke to Mr. Cannon. I was first arrested on an information (567). Mr. Fuchslin swore to a complaint. At that time I did not have any conversation with Cain in which I demanded that he pay my attorney's fees; and I did not tell him that if I did not get the money I would put myself at the mercy of the Court and tell all that I knew and

(Testimony of Charles Malaby.)

ruin Mr. Cain. I never did make any such statement. I did ask Mr. Cain if he would be kind enough after all the hard work and all the money I turned in to the office, if he would help me hire a lawyer, and he said he would not. I did not threaten to testify against him (568). I did not in the middle of July, 1944, go to Cain's office, and in the room where Mrs. Anderson was present, state to him that I wanted him to pay Mr. Jake Ehrlich's fee and that if he did not do it I would go to the United States Attorney and tell him everything I knew. I asked Mr. Cain if he would hire an attorney for me, and Newman, and he said that he would come to San Francisco and speak to Ehrlich. He did come to San Francisco, and gave Ehrlich a letter, I believe, that he would pay him \$5000 after he sold his license; and after that he refused to pay the money. I am not angry [183] at him or anybody. I never threatened Mr. Cain; and I never insinuated I would go to the FBI or anybody else (569). I did not go to Mr. Cain's office in August and tell him I had collected over \$150,000 in black market money and that Mr. Cain knew nothing about it. I asked Cain what he was doing with all the money that he had received in that office. Cain did not ask me what I had done with all of this money. I never did tell Cain that he had never received a dime of black market money. During the month of September I did not call at the office and talk to Cain in the presence of Mrs. Anderson and threaten to do him harm, and to go to the Federal

(Testimony of Charles Malaby.)

authorities and tell everything I knew; and Cain did not tell me to go ahead. I have never threatened Mr. Cain, under any circumstances. I did not on October 17, 1944, go to Mr. Cain's office and admit that I had stolen a check from the Lake Inn Corporation for the sum of \$904.75, cashed it and put the money in my pocket. One time Nate Newman and I and Cain were present and Cain said that there was a man who had given an order and he had not received the check on it. I told him I had received the check and cashed it, to pay Goldstein and other people who had demanded their money; and I told him I had a right to cash it. Cain then said he could put me in jail for that. I admitted taking the money; but I had a right to receive money; my credentials show that. The check was made payable to International Import Company and I signed it "International Import Company by Charles Malaby". My credentials show that I have a right to receive money. Mr. Cain knew about these black market transactions. I never have told anybody that Cain did not know anything about these transactions. He did know about them; and he knew about them all of the time. He told me that he had to lay 50 cents aside for protection when that [184] liquor came. It is not true that he discharged me from the employ of the International Import Company as soon as he found out about the transactions. I do not know a Mr. Mathias (574) of Los Angeles. Mr. Mathias never gave me a dime at any time. I do not even

(Testimony of Charles Malaby.)

know the name. I know an attorney in Los Angeles named Charles Taylor, but that does not remind me of a Mr. Mathias. I did not tell him that I was going to get out of the trouble that I was in because I was going to blame it on others. I never made that statement to anybody. Before I took the stand to testify I did not have a conversation with the United States Attorney, or anybody representing him; although I did have a conversation with my attorney. No arrangement was made at any time regarding my testimony. My attorney told me the only thing I could do is to go in and plead guilty. I have not been promised probation nor immunity from a jail sentence; and I have no previous arrangement whatsoever with any representative of the United States Government, either directly or indirectly (576).

Cross Examination

By Mr. McGuire:

This arrangement regarding the sale of liquor which I have testified to was entered into not very long before I met Lowenthal; but it was before I knew him that it was first entered into. As part of the transaction I was to secure the services of certain salesmen. I secured the services of several, including Lowenthal and McKinnon. Navinger came into the picture quite a while after that (576); and I gave these salesmen certain instructions as to what they were to do. They knew what the ceiling was because I told them, and I told them a price to

(Testimony of Charles Malaby.)

charge from \$52.50 to \$55. The first price I quoted them was \$51. Later I told them to raise the price because Mr. Cain, the boss in Los Angeles, [185] said that he had to get a certain amount of money extra to pay certain protection, and we had to raise the price on liquor. I told that to Lowenthal. I did not write down any breakdown of the price. I had it written down, and he copied it, I believe. Under my instructions to them I was to close the deals myself, and sign up the contracts myself, and collect the money. Lowenthal did not go to work for me for about a month or six weeks after I first contacted him. I met him through a friend of mine. Lowenthal was supposed to get 5 percent. The salesmen were merely what might be called bird dogs. The salesmen were to get the connections. I did leave a few signed blanks with Lowenthal. All the salesmen were to do was to get the connections and turn them over to me, and I was to do the rest. He took me to the people on every occasion. The first deal he turned over to me was Robert Thomason, and Lowenthal and Thomason went to Files' office, but Files was not in his office when we came in and we waited. Finally I asked the girl to see if she could reach him on the phone; the girl did, and I talked to Files; and he told me I could sign the receipt myself. So I asked the girl to typewrite a receipt, and she did, and Mr. Thomason turned the money over to me. Lowenthal was sitting, waiting outside of the counter. I completed the transaction myself and collected the

(Testimony of Charles Malaby.)

money. I believe that Navinger told Lowenthal about the Elliot Smith deal, and Lowenthal and Navinger talked to him; and I think Navinger quoted the price (581). Lowenthal was present when the deal was closed. I met Lowenthal and Navinger there, and I talked with Smith, and signed the order, but he had all the money counted on the table; that is, the overage money (581). I do not recall how much it was, but I took the money. I think Lowenthal walked outside [186] at the time, but I do not recall exactly. He had nothing to do with the completion of the transaction, as it was between Navinger, Smith, and me. Both Navinger and Lowenthal received a little commission. I paid Lowenthal out of my own pocket. Lowenthal took the Di Silva deal. I had a blank signed and left it with him, and he went out and signed up for ten cases, I believe. Then I went to Lowenthal and he said he had the money for the ten cases, and he gave it to me (583). Exhibits 25-A and 25 for Identification are written wrong because we did not have any mixed whisky. It is not in my handwriting, and I do not know whose it is. I did not take any order for 10 cases of mixed whisky. I did not sell Di Silva some Rock Creek whisky. He was kicking about his order being late, so I went and bought two cases and took it to him to make him happy (583). At one time I turned the Rock Creek whisky over to Lowenthal and he delivered them for me, and collected the money for the two cases for me, and turned the money over to me. Later I signed

(Testimony of Charles Malaby.)

Di Silva for 10 cases of McHenry whisky. At or about the time of the McNeil transaction was made I was going to Los Angeles, and Lowenthal told me that he had a prospect for 200 cases. I left four blank contracts with him. They were signed in blank. I was gone a few days. The contracts which I had signed and left with Lowenthal were not for any particular order because I did not know anything about it. About two and one-half weeks later I discovered about the transaction. I had not seen Lowenthal. I discovered he had made that deal, and then I went over to see Mrs. McNeil alone the first time, and I asked her who she gave that order to and she said Lowenthal; and I asked her if she had given Lowenthal any money, and she said she had given him \$5300. She showed me the order that Lowenthal [187] had given her, and the receipt for the money. I did not pick up those papers at the time, but I saw Lowenthal and asked him about that order, and if she had given him any money, and he said that she had. He told me he had it in his safe deposit box, and had not turned it over to me because she told him not to give it to me. We got in the car and went over to see her, and I asked her if she had told him to turn the money over to our office, and she said that she had not so told him, but wanted him to turn the money over to our office. Then she said she wanted her money back, and Lowenthal said that he would get the money and would see Mr. Malaby tomorrow. We picked up those contracts a long time after that, when the

(Testimony of Charles Malaby.)

whisky came in, and when we were going to deliver 50 cases to her. We wrote up a new invoice. Newman and I were there. Lowenthal had nothing to do with that transaction, for the 50 cases. The receipt and the contract were turned over to the office. Later Nate Newman came to San Francisco and I told him about the transaction, and I took him to Lowenthal's home, and Lowenthal said the money was in the safe deposit vault, but that he did not have all of the money. He turned over some money to Nate Newman. I did not give McKinnon the same instructions I gave Lowenthal. I charged him \$1 more (589).

Cross Examination

By Mr. McDonald:

All of the transactions with Mr. Files were conducted by Nate Newman, but the escrow matter was consummated by Nate Newman.

Cross Examination

By Mr. Cannon:

Mr. Cannon: I was going to ask a couple of questions very briefly.

Q. Mr. Malaby, in this indictment it is charged that you people are engaged in the scheme of this conspiracy to [188] commit violations of the law and performed two overt acts. I am going to read them to you. There are first two overt acts, and I am going to ask you if you can tell me the circumstances of those. The first overt act is: "On or about March 10, 1944, the defendants Nathan New-

(Testimony of Charles Malaby.)

man, Charles Malaby, R. H. Shaeffer, and Walter O. Files met together at 309 Kearney Street, San Francisco, California.” Can you tell me what the occasion of that meeting was? I have no objection, if Mr. Licking has the information from the gentleman who was on the stand the other day, Mr. Williams, refreshing Mr. Malaby’s recollection. We were going to get that from the bank account.

Mr. Licking: Yes.

Mr. Cannon: Q. Was that in connection with the Williams transaction, do you know?

A. I think it was. (591)

* * * *

Mr. Cannon: Q. Let me ask you this question, then, Mr. Malaby: Do you remember any occasion on or about March 10, 1944, when Nathan Newman, Charles Malaby, R. H. Shaeffer and Walter O. Files met together at 309 Kearney Street, San Francisco?

A. I don’t recall the exact date, Mr. Cannon. We have met several times and talked, but I don’t remember that particular date.

Q. I am not trying to confuse you. I just want to get the date fixed. A. I know.

Q. But in any event, you four did meet on or about the date of the opening of the escrow regarding a Mr. Williams, is that correct?

A. That was long before that.

Q. Not earlier than March 10, was it?

A. It could be March 10; it could be around that. I don’t recall the exact date.

(Testimony of Charles Malaby.)

Q. You do not recall any——

A. I think the Williams [189] deal was before that, long before that.

Q. Then the second overt act, to which you said you pleaded guilty, was on or about March 11, 1944—that is the day after—on or about March 11, 1944 the defendants Charles Malaby.

Mr. Licking: Counsel, pardon me. I don't like interrupting you, but we will just save a little time. Leave the overt acts except the last one. I have to prove one of them only. There is one of them proved. This Navinger transaction is proved beyond all doubt as to dates and everything. Just leave the rest of them for the purpose of your case.

Mr. Cannon: I do not know the purposes of the case.

Mr. Licking: All right, I will abandon them for purposes of my case.

Mr. Cannon: Let that be understood, then. Counsel abandons all the overt acts except the last one alleged.

Mr. McDonald: I did not hear Mr. Licking's reply.

Mr. Licking: Yes. (591-592)

(Witness continuing:)

I do not think Mr. Newman met Mr. Lowenthal until a little before the McNeil deal. Referring to the overt act in the indictment, that “on or about March 11, 1944, the defendants Charles Malaby, Nathan Newman, and Oscar Lowenthal met to-

(Testimony of Charles Malaby.)

gether in the city of San Francisco," as I remember the only meeting was long before the McNeil deal as shown on Exhibit 8 for Identification, dated May 23, 1944. The order was taken a couple of weeks before I knew anything about it; and then when I did find out about it, Newman did not come down to San Francisco for a couple or three days after that. The only meeting that Newman, Lowenthal, and I had on or about March 11 was on the McNeil transaction, and my estimate was that it was two weeks prior to May 23. [190] It is my best recollection that it was sometime in March (594). I think I did introduce Lowenthal to Newman some time about March 11, 1944, but I am not sure.

Cross Examination

By Mr. Gillen:

I recall telling Mr. Cannon on his cross examination, with respect to the first overt act contained in the indictment, that I, Nathan Newman, Files, and Shaeffer met in Shaeffer's office on or about March 10, 1944. What I meant by saying that we had several meetings, that we used to meet right along after that and say "hello, how are you?" because we knew Files and Shaeffer. I did not mean that we had any special meetings. During the early part of the year and while these transactions were going on, I remember that Shaeffer told me that he was farming peas in Mendocino County (596). I recall that I contacted Shaeffer first and told him that I wanted to get a wholesaler because I was bringing

(Testimony of Charles Malaby.)

some whisky out from the east. Shaeffer told me that Files had a relative by marriage who was employed by the Schenley people, and that he would introduce me to Files, and that I might be able to get a connection through that relative. That was done merely as a matter of personal courtesy to me. Subsequently Newman and I negotiated with some official of the Schenley Company whom we met through Files' relative. We negotiated with this official for more than a couple of weeks. The man's name was Schrader who was district distributor for the Schenley Company. At that time we were seeking the Schenley Company or any other legitimate distributor to handle our products; and we became discouraged when we were not able to get a distributor, and asked Shaeffer if he could get somebody who could handle the escrow transactions for us. Shaeffer told us that he would see if Files would handle an escrow transaction for us. [191]

Redirect Examination

By Mr. Licking:

The nature of the transactions and the course of the money that was to be deposited in escrow had been explained to Shaeffer. I had a conversation with him in this connection the first time we came to San Francisco to look for a wholesaler. I had known Shaeffer for many years and was alone when I saw him at his office on Market Street. It was prior to March 22, 1944, when I had this first conversation with Shaeffer—I believe it was in January. At that time I and Newman had developed a plan of opera-

(Testimony of Charles Malaby.)

tions between ourselves. We had just started it. The plan which Newman and I had devised prior to that was to sell whisky over the ceiling price. All I told Shaeffer at that time was that I wished he would help me to get a wholesaler; and I told him I wanted him to come up and meet the two Newmans, Morrie and Nate, at the St. Francis Hotel, and I introduced him there to Nate and Morrie Newman. I do not recall that there was any discussion at that time about the plan of operations (602). Shaeffer came up there himself several times when I was not there. I believe I did say something to Shaeffer about our plan of operations after we were arrested at the Fairmont Hotel, but I am not positive. That was after the Williams transaction (602). It was after we had gotten Files to act in the matter that I discussed this plan with Shaeffer.

Q. I call your attention to your testimony here, referring now to page 60:

“Q. Mr. Williams mentioned the necessity for some escrow holder, some one to hold the money?”

“A. Yes, he did.

“Q. What did you next do?”

“A. I went to my friend Mr. Shaeffer and asked him if he knew, can he get me [192] to someone who can escrow this money, and he said he would speak to Mr. Files.”

A. That is right.

Q. At that time did you tell Mr. Shaeffer what this money was?

(Testimony of Charles Malaby.)

A. No, I didn't, because he told me at that time that Mr. Files didn't want to know anything about whisky.

Q. What was it Mr. Files didn't want to know about?

A. He didn't want to know about any illegal transaction. All he wants to give is a receipt for the money.

Q. He didn't want to know about it, or he didn't want to make any record of it? Which was it?

A. Well, he didn't want to make any record of it either.

Q. I am asking you about your conversation with Mr. Shaeffer, not about your conversation with Mr. Files. Did Mr. Shaeffer know what this money was that you were seeking to have deposited? Did he know that that was overage that you had collected?

Mr. Gillen: Just a moment. Objected to as calling for his opinion and conclusions of what Mr. Shaeffer did.

The Court: If he knows he may answer.

A. I don't know whether he knew at that time or not, Mr. Licking. (603)

(Witness continuing:)

We never had any agreement with Shaeffer as to the amount of commission he was to receive. The agreement was between Newman and Files. I do not know what arrangements were made between Files and Shaeffer. I had no arrangement with

(Testimony of Charles Malaby.)

Shaeffer at all for any commission. Subsequently, I was present on several occasions when money was deposited in Files' office, and Shaeffer walked in and out. He went in there to tell Files something, and then he walked out again. At one time Files was away and Shaeffer accepted the money [193] and gave the man a receipt for it, signed by Files (604). That was the Pitta transaction shown on Government's Exhibit 14 for Identification. The receipt was signed by Files and the transaction handled by Shaeffer. I brought Mr. Pitta in, and he deposited \$3200. Files wasn't at the office at that time. Shaeffer was there and he took this gentleman to the office, and Shaeffer said that he had a receipt signed by Files and gave it to him as receipt for \$3200. Shaeffer then took the cash. That money was later turned over by Files to Newman. I did not discuss with Shaeffer the plan of operations until this trouble started; that is, until the arrest at the Fairmont Hotel. At that time there wasn't any whisky delivered. We were only taking orders. That was six or seven months ago, and that was after March 22 when I had received the letter from Cain. The arrest at the Fairmont was made February 14, 1944. Newman and I were both arrested in Newman's room, and were held about three hours and released. It was after that arrest that I had my first discussion with Shaeffer concerning the plan of operation, although we had talked before that time, but he did not know about the overage and all that till a long time after that

(Testimony of Charles Malaby.)

arrest. I believe he first knew about it when I got my credentials in March, after the Williams transaction. I might have discussed the overage and all of that with Shaeffer a day, or two, or three after I got my credentials, after I had come back to San Francisco from Los Angeles. We were alone and I think we were having a sandwich or something across the street from the office on Kearny Street.

Mr. Licking: Referring to the testimony of Williams, it is stipulated that with reference to certain payments he would testify as follows, namely, that the amount of \$10,255 was paid by him in the transaction and which he deposited on [194] February 3, 1944. That was returned to him in the amount of \$1135 on April 7th, and on May 14th an additional amount of \$5500 was returned.

Mr. Cannon: So stipulated. His testimony is slightly different than the way it turned out. He claimed he deposited the money, that he deposited the money on a certain date; the sixtieth day thereafter he demanded the return of his money. Apparently he didn't get his money back until May.

Mr. Licking: Well, February, March, April that would be—from February 3rd to April 7th when he got it back.—

The Witness: It was a ninety-day receipt.

Mr. Cannon: I think perhaps it is right. He got part of it back April 7th, \$1135, and on May 14th—

The Witness: I paid him that in cash.

Mr. Cannon: He got back \$5500. (608-609)

(Testimony of Charles Malaby.)

(Witness continuing:)

I think the first time that I ever mentioned anything to Shaeffer about overage and all of that was the latter part of March while we were having a sandwich. Shaeffer said Files was getting uneasy, or something like that, about this money; and I told Shaeffer that all of this money was overage money, but did not think we would have any trouble, something like that. Shaeffer and I were alone (610). The first money that was ever paid back was that of Mr. Williams; ninety days after the money was deposited, Williams made the demand on Files and Files stalled him for about a week until Newman came down. I was here. Files said he wanted us to get him that money so he could give it to Williams.

Q. At that time can you state whether or not, of your own knowledge, Mr. Files knew the nature of the transaction, knew what the money had been for? A. Yes, I believe he did.

Mr. McDonald: I move that be stricken. [195]

The Witness: Yes, he did. He did.

Mr. McDonald: I object to that as calling for a conclusion of the witness.

Mr. Licking: Q. Well, had it been discussed by you and Mr. Newman and Mr. Files, the nature of this payment, and what it was for?

A. Mr. Newman was the one who made the original deal with Mr. Files. Whether he told him about it at that time, or not, I don't know, but later on——

Mr. McDonald: I ask it to go out.

(Testimony of Charles Malaby.)

Mr. Licking: He said, "But later on."

The Witness: May I answer?

Mr. Licking: Yes.

A. Later on we talked about it; that is maybe a month, maybe three or four weeks after that; maybe two months after that.

Q. You do know the whole nature of the transaction was discussed by yourself, Mr. Newman, and Mr. Files? A. Oh, yes.

Q. So, there is no doubt in your mind that he knew what was going on? A. No.

Mr. McDonald: I would like the foundation laid for that discussion.

Mr. Licking: Q. Was it discussed on more than one occasion?

A. Well, every time someone made a demand for his money naturally we talked about it. (611-612)

(Witness continuing:)

The first one of the occasions when anyone demanded his money back was Williams. And that resulted in the first payment of \$1135 which I paid to Williams in cash on April 7. I made a sale and gave the money to Nate Newman, and Nate Newman took it to Files. Then I made another sale, and another one, until we had \$10,500, the full amount. That money was not put through the same escrow with Files, but was taken directly by me and did not go through the escrow. Files did not escrow [196] very many; maybe five or six, because any time the people gave us the money directly, I did

(Testimony of Charles Malaby.)

not take it to Mr. Files, because I wanted to save that 5 percent for the office. The date of the check on the Spenger transaction was April 24. Mr. Files knew what that money was for and collected his commission on that amount. It was on April 24 that I went to Spenger's place and brought Spenger over to Files' office. Benson was with me and Files deposited his check. Files gave the receipt and Spenger went across the bay and after Spenger had left, Files said he did not want to cash the check and asked me if I could cash it. I said I would try. I took the check to Mrs. Schilling and asked her if she would cash it for me, and she did, and gave me the cash and I took it down to Files' office (614) and turned it over to him. He figured his commission and turned the balance over to me.

Recross Examination

By Mr. Gillen:

When it came to my attention that in the course of pursuing this business we had to have an escrow holder, I went to Shaeffer to see if he, with his acquaintance in San Francisco, could recommend someone. He said he would talk to Files. Later he told me that Files would handle the escrow transaction but that he did not want anything mentioned in his office about whisky because Mrs. Files, with whom Files was having strained relations and there was a divorce pending, was employed in the office, and she had a very great dislike for liquor and the liquor business. I believe it was after I received my

(Testimony of Charles Malaby.)

credentials from the International Import Company that I first mentioned the word "overage" to Shaeffer. It could have been before, but I think it was after. I received my credentials on March 26, as shown by Government's Exhibit 22-A. I got them when I was personally present in Los Angeles; then [197] I returned to San Francisco and it was some-time after that that I was having a sandwich with Shaeffer and related to him what I have said here. At that time I told him I did not think we were going to have any trouble, and said that I believed Mr. Cain was going to take care of things all right; but I did not go into any detail, and merely used the word "overage." (616)

Recross Examination

By Mr. McDonald:

That is the first time that I mentioned "overage" to Shaeffer. I did not speak to Files about "overage" at all until after several transactions when people started coming in and asking for their money back. It was after I first spoke to Shaeffer that I first spoke to Files.

Redirect Examination

By Mr. Licking:

I had spoken to both of them, however, before the Spenger transaction. There was some discussion with Shaeffer and Files before April 24, the date of the Spenger transaction, concerning the nature of the overage. The money that was paid back to Williams was delivered by Newman to Files, and Files gave it to Williams, in two or three payments.

(Testimony of Charles Malaby.)

Further Recross Examination

By Mr. McDonald:

I never personally gave any money to Files. I gave it to Newman.

Further Recross Examination

By Mr. McGuire:

Lowenthal asked me to get a letter from the International Import Company authorizing him to act as salesman, and I told him when I went to Los Angeles I would get him one, but I never did. I told him that the International Import Company was a good company. I never did tell him that the entire transaction was on the up-and-up. I was present when McKinnon and Lowenthal discussed an extra dollar. The arrangement was that whenever McKinnon made a sale he was supposed to turn [198] over a dollar to Lowenthal, but that arrangement was never carried out. (621)

W. H. BENSON

a witness for the Government, being recalled, testified further as follows:

Direct Examination

By Mr. Licking:

After the Spenger check was cashed I had a conference with Shaeffer and Files and Spenger. It was several weeks later, in my hotel. We were trying to figure out some way to secure the money, and Shaeffer and Files were apparently willing to cooperate,

(Testimony of W. H. Benson.)

but no discussion was had as to the apparent violation of the escrow terms. After I discovered that the check had been cashed, but before the conference in my room between Spenger, Files, Shaeffer and myself, Files and I were alone. I asked Files if the check had been cashed and he said "yes," and, if I remember correctly, he turned the money over to Malaby. I told him I did not think that was exactly the right thing to do, and he said that it was his understanding that when the liquor was supposed to come in, the check was supposed to be turned over. Before Malaby left for Los Angeles he called me one evening and asked if I would do him a favor because he had to go to Los Angeles, and he understood the car of liquor was to come in, and wanted to know if I would take some papers over to Spenger and have him sign them, and leave a copy with Spenger, and mail the original to the International Import Company. I did that (625). Exhibit No. 4 on the stationery of International Import Company is one of the papers that I mailed, I think. I sent it with a letter of transmittal to International Import Company, and that is Exhibit 4-B for Identification. I never received any answer to that letter. I wrote several letters down but received no reply. I know [199] Cain personally, and have known him for some-time, but I have only met him personally about a year ago. I never met and discussed with Cain any of these transactions. I did not receive any reply to any of my letters, except that I received a reply from his attorney. In my letter to Cain I stated that

(Testimony of W. H. Benson.)

the money deposited by Spenger or the check deposited by him had been cashed and the cash taken. I never received from Mr. Cain any acknowledgment of that correspondence. The letter which I have just seen, which you have handed me, is headed "Burt Mathes" and is addressed to me on June 24, 1944.

Mr. Licking: Then I offer it as against Mr. Cain at the present time.

Mr. Ames: Are you offering it in evidence?

Mr. Licking: Yes, I am offering it in evidence.

Mr. Ames: I will object to it as incompetent, irrelevant and immaterial, serving to prove none of the matters with which we are concerned here to-day.

The Court: Your objection will be overruled.

Mr. Ames: Exception.

(The letter was marked U. S. Exhibit 31 in evidence.)

(Mr. Licking then read U. S. Exhibit 31.)
(627)

Cross Examination

By Mr. McDonald:

When I met Files in my room at the Hotel I think Files said that his agreement with Malaby was that when the car arrived the money was supposed to be turned over. Files was cooperative in every way in trying to secure this money. I would not accept any money on the Spenger transaction. I did not receive \$500. (628)

(Witness excused.)

Mr. Licking: * * * there has been introduced for

identification the certificate of the Office of Price Administration showing the filing by the Midvalley Distilling Corporation [200] of the price basis necessary for the establishment of a ceiling price on a particular commodity. The general provisions are set out in 8 Federal Register 11161, issued 8/9/43, effective 8/14/43, quoting:

“Under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942 as amended, and Executive Orders Nos. 9250 and 9238, maximum price regulation No. 445, distilled spirits and wine, which is annexed hereto and made a part hereof, is hereby issued.”

There is attached to the regulation No. 445 a statement of considerations for the issuance of the regulation, which was also issued as of 8/14/43, and is attached to the regulation.

After a preliminary finding of facts, there is this finding:

“These facts”—mentioning facts set out in the preamble—“combined with a greatly increased demand for beverage distilled spirits and wine at the consumer price level, have developed substantial pressure on prices.”

And then follows a statement of considerations which is some twelve pages long, setting forth the consideration on which the price regulation was adopted.

I call these to your Honor's attention not because I consider it necessary to introduce them in evidence, but for the convenience of the Court.

Mr. Cannon: You are not offering them in evidence, are you?

Mr. Licking: I am offering them in evidence at this time.

Mr. Cannon: I object, if your Honor please, on the ground that there is nothing in the indictment upon which [201] such an offer could be predicated, particularly in view of the demurrer heretofore interposed to the indictment, and in view of the further objection made to the introduction of evidence under the indictment on the ground no sufficient charge is made of any public offense, and the indictment itself in terms excludes any conspiracy to violate Section 902(a) of volume 50 of the appendix, U.S.C. It is immaterial, incompetent, and irrelevant.

The Court: Your objection must be overruled.

Mr. Cannon: Exception.

Mr. Ames: That objection goes to all of the defendants.

Mr. Cannon: Yes.

Mr. Licking: Now, if the Court please, I offer this in evidence as Government's Exhibit 1, heretofore offered for identification, as to all of the defendants. That is the certificate of the OPA—the certificate of filing with the OPA by the distillery.

Mr. Cannon: It is hearsay as to all defendants. I make the objection jointly and severally on behalf of each defendant.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 1 for Identification was received in evidence.)

Mr. Licking: I now offer Government's Exhibit 2 for Identification against the defendants and all of them. (629-630-631) * * *

Mr. Cannon: To which I object on the ground it is incompetent, irrelevant and immaterial, no proper or any foundation laid as to any defendant, and I object to it on behalf of each defendant separately on the ground it is hearsay.

The Court: Your objection will be overruled.

Mr. Cannon: Exception. [202]

(U. S. Exhibit 2 for Identification was received in Evidence.)

Mr. Licking: May I have now Government's Exhibit 3 for Identification, the invoices covering the Vincentini transaction at Stockton? In connection with that, the Government's Exhibit 3-A for Identification, consisting of certified check debit, receipt signed by Mr. Malaby referring to the Files escrow, and also a receipt signed by Mr. Files for \$2100 dated April 20, 1944; also as part of that a photostatic copy of a note signed by Mr. Files and Mr. Shaeffer, defendant Files and defendant Shaeffer, dated June 21, 1944, agreeing to pay \$3,668 to Steve Vincentini.

Mr. Cannon: I make the same objection on behalf of all defendants jointly and severally, and particularly to the promissory note of June 21, 1944 attached as part of that exhibit offered, it being a note signed by Mr. Files and Mr. Shaeffer, on the ground it is hearsay as to anybody other than those two defendants.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Licking: I also offer 3-B under the same statement of facts as this.

Mr. Ames: If your Honor please, I particularly make a further objection on the part of the defendant Cain and also for the benefit of all the defendants and for and on their behalf. I object to the introduction in evidence of any of these vouchers or bills, whatever they may be called, invoices, for the additional reason that this particular one, Exhibit 3, and all like it, do not in any degree show any violation whatsoever of the statute upon which the prosecution lies. On the contrary, these invoices show that these goods were sold at the ceiling price and nothing more. I make that general [203] objection. I am going to make an objection to all of these documents for the reason that they do not prove any participation in any crime whatsoever.

The Court: The objection will be overruled.

Mr. Ames: Exception.

(U. S. Exhibits 3, 3-A and 3-B for Identification were received in evidence.)

Mr. Licking: I also offer Government's Exhibit 3-C under the same statement of facts.

Mr. Cannon: I make the same objection on the same grounds.

Mr. Ames: I make the same objection on the same grounds.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Ames: Exception.

(U. S. Exhibit 3-C for Identification was received in evidence.)

Mr. Licking: I am perfectly willing to stipulate in the record, your Honor, that the same general objection heretofore offered by counsel to the exhibits I have offered be entered in the record.

Mr. Cannon: As far as my client is concerned, we object to the offer of each and all of these exhibits that counsel has offered or is about to offer, and we make the objection on behalf of each and every defendant, jointly and severally, on the following grounds: that they are incompetent, irrelevant and immaterial, because they have no bearing upon any issue in the case, and on the further ground that they are hearsay as to these defendants; on the further ground that they are or could have no probative value on the proving of any conspiracy, because they relate to past transactions, and after the completion of the crime which the indictment alleges was committed. In other words, many of these documents and [204] transactions relate to occurrences subsequent to the date upon which the alleged conspiracy was complete, the crime of conspiracy was complete.

Mr. Licking: What date do you contend the conspiracy was complete?

Mr. Cannon: The date when the Court finds, if it does so find, that the first overt act alleged in the indictment was committed. I make that statement so there will be no question of the stand we

take in the matter. Counsel yesterday sought to establish——

Mr. Licking: I didn't particularly seek to do it, counsel.

Mr. Cannon: If I may have that running objection on behalf of each and all of the defendants, it may be understood that the objection goes to the offer of each and all of them, and I will not interrupt any more.

The Court: Your objection will be overruled.

Mr. Cannon: May I have a stipulation?

Mr. Licking: Yes, I am perfectly willing to stipulate for the purpose of the record that that objection may be considered as a running objection to all of the exhibits I propose to introduce.

The Court: Very well.

Mr. Ames: And so far as the documents are concerned, they could tend to prove no crime as alleged in the indictment. I make that objection on behalf of the defendants.

The Court: The objection is overruled.

Mr. Ames: Exception.

Mr. Licking: I offer in evidence certain exhibits concerned with the—for the purpose of identification to the Court at this time—those exhibits concerned with the so-called Spenger transaction, first Exhibit 4-A for Identification, which I request be given the same number in evidence, a check of Frank [205] Spenger & Company to Cash, bearing the endorsement which has been heretofore identified, and a receipt dated April 24, 1944, from Frank

Spenger, showing receipt of \$13,736 on a 90-day escrow agreement, signed W. A. Files.

Mr. Gillen: Is it offered against all defendants?

Mr. Licking: Against all defendants.

(U. S. Exhibit 4-A for Identification was received in evidence.)

Mr. Licking: I offer next Government's Exhibit 4 for Identification, and ask that it take the same number in evidence. It is offered as to all defendants, consisting of a certified check debit for \$1,809.50, and the invoices, receipts, and sales orders from the International Import Company showing a shipment of whisky in that amount. I also offer at this time as part of the same exhibit a sales order signed April 27, 1944, identified as sold to Frank Spenger, some 500 cases of McHenry Reserve whisky, bearing the notation "No cash down." This, your Honor will recall, was identified by the witness just on the stand, Mr. Benson, as enclosed by him at Mr. Malaby's request in his letter of May 3, 1944, which is Government's Exhibit 4-B for Identification. I offer the letter at this time.

The Court: It may be admitted and marked.

(U. S. Exhibit 4-B for Identification was received in evidence.)

Mr. Licking: I likewise request that the sales slip identified as having been transmitted in that letter be detached from this Exhibit 4 and made a part of the exhibit just offered, 4-B.

(The sales order referred to was made a part of U. S. Exhibit 4-B).

Mr. Licking: Exhibit 4, which I have heretofore partially [206] identified, consists of invoices, receipts, and a certified check debit for the payment of 50 cases of McHenry Reserve whisky, which testimony shows in the record was actually delivered to Mr. Spenger.

(U. S. Exhibit 4 for Identification was received in evidence.)

Mr. Licking: I next offer in evidence Government's Exhibit 5, which is concerned with the Vic Figone transaction. (632-637) * * *

Mr. Licking: ——I offer in evidence Exhibit 5 against all defendants and ask that it take the same number in evidence.

(U. S. Exhibit 5 for Identification was received in evidence.)

Mr. Gillen: By the way, before you leave 4-B, that Benson letter, are you offering that?

Mr. Licking: I did offer that against all defendants. (638) * * *

Mr. Licking: Next, Exhibit 6 and following exhibits. (638) * * *

(U. S. Exhibit 6 for Identification was received in evidence.)

Mr. Licking: I also introduce the sales slip as Government's Exhibit—is that 6?

The Clerk: 6-a.

(The sales slip was marked U. S. Exhibit 6-A in evidence.)

Mr. Licking: I next offer in evidence Govern-

ment's Exhibit 7 for Identification, which is the invoice and receipt for merchandise to be delivered, issued under the heading of the International Import Company. I ask that this receipt receive the same exhibit number in evidence.

(U. S. Exhibit 7 for Identification was received in evidence.) [207]

Mr. Licking: Now, in connection with the Thomason transaction, this is the transaction which was handled—one of the transactions which was handled by Mr. Lowenthal and apparently turned over by him to Mr. Malaby, in which Mr. Malaby executed the receipt for the overage payment. I introduce that as Government's Exhibit 7-A for Identification and ask that it be given the same exhibit number in evidence, as to all defendants.

(U. S. Exhibit 7-A for Identification was received in evidence.) (639-640) * * *

Mr. Licking: Next, Government's Exhibit 7-B for Identification, a sales slip, International Import Company, showing the order from Thomason on April 4.

(U. S. Exhibit 7-B for Identification was received in evidence.)

Mr. Licking: I now offer in evidence Exhibit 8, which are the exhibits concerned with the so-called McNeil transaction, the transaction with Margaret McNeil, which the testimony shows was initiated by Oscar Lowenthal, where he collected some \$5,000. The first exhibit is the invoices of the International

Import Company and a letter of transmittal showing the shipment of 50 cases of McHenry Reserve whisky to Margaret McNeil at the ceiling price. It will be recalled the witness testified it was received.

(U. S. Exhibit 8 for Identification was received in evidence.)

Mr. Licking: Government's Exhibit 8-A for Identification shows an order for 200 cases of whisky from Margaret McNeil dated April 29, 1944.

(U. S. Exhibit 8-A for Identification was received in evidence.)

Mr. Licking: I next offer in evidence Government's Exhibit No. 9 for Identification, which consists of different invoices, sales orders, and receipts, together with a letter of [208] transmittal from the International Import Company showing the sale to the Miami Inn. Your Honor will recall that particular case; Pete de Georgis testified in that connection it showed the sale to the Miami Inn of 100 cases of McHenry Reserve whisky at the ceiling price.

(U. S. Exhibit 9 for Identification was received in evidence.)

Mr. Licking: 9-A for Identification shows the order dated April 5, 1944 for the same liquor.

(U. S. Exhibit 9-A for Identification was received in evidence.)

Mr. Licking: I next offer in evidence Government's Exhibit 10 and 10-A. Government's Ex-

hibit 10-A consists of two cards from the—of the International Import Company, one the card of O. (Rosie) Lowenthal, the other the card of Charles Malaby.

(U. S. Exhibit 10 for Identification was received in evidence.)

Mr. Licking: No. 10-A. I now offer 10-A for Identification in evidence. It consists of sales receipts and invoice on the heading of International Import Company showing the legitimate or ceiling transaction.

Mr. Gillen: What case is that, Reali?

Mr. Licking: Pete Reali. In that case Mr. Reali and Mr. Malaby both testified as to the receipt by Mr. Malaby of the overage payment.

(U. S. Exhibit 10-A for Identification was received in evidence.)

Mr. Licking: Government's Exhibit 11 is the Bryden transaction, the proprietor of the Jungle Inn in San Pablo. (641-643) * * *

(U. S. Exhibit 11 for Identification was received in evidence.)

Mr. Licking: Next, Exhibit 12 and 12-A. These are the [209] Nello Nomellini transaction, the Bluebird Cafe and the El Lido Bocci Ball Alley. (643) * * *

(U. S. Exhibits 12, 12-A and 12-B for Identification were received in evidence.) (644) * * *

Mr. Licking: —Exhibit No. 13. I now offer this in evidence.

(U. S. Exhibit 13 for Identification was received in evidence.) (644)

Mr. Licking: Now 14 and 14-A—to return to the Costa transaction, 13-A for Identification is a certified check for the amount shown in the invoice which has previously been identified as Government's Exhibit 13.

(U. S. Exhibit 13-A for Identification was received in evidence.)

Mr. Licking: And Government's Exhibit 13-B is the sales slip for Costa's place in Oakland, showing 50 cases of whisky, and Government's Exhibit 13-C is apparently a photostatic copy of 13-B.

(U. S. Exhibits 13-B and 13-C for Identification were received in evidence.)

Mr. Licking: Now Exhibits 14, 14-A, 14-B and 14-C. Government's Exhibit 14 shows the original order, the receipts of the Valley Express Company, shipping receipt or invoice. I now offer 14.

Mr. Gillen: Which transaction is that?

Mr. Licking: Amaro Pitta, North Pole Club.

Mr. Gillen: Pitta?

Mr. Licking: Yes.

(U. S. Exhibit 14 for Identification was received in evidence.)

Mr. Licking: Government's Exhibit 14-A for Identification, which I now offer in evidence, is a sales slip or order blank, [210] rather, executed, April 22, 1944 for 100 cases of McHenry.

Government's Exhibit 14-B for Identification, I

now offer in evidence. It is a receipt signed W. O. Files, showing the receipt from Amaro Pitta of \$3,200, (645-646)—I offer Government's Exhibit 14-C for Identification, a note dated June 22, 1944, signed by W. O. Files and R. H. Shaeffer, promising to pay to Amaro Pitta the sum of \$3,200.

(U. S. Exhibits 14-A, 14-B and 14-C for Identification were received in evidence.)

Mr. Licking: Government's Exhibit 15 is the sales invoice and receipts which the record shows were executed by Mr. Malaby, given to Mr. Burnett, and were by Burnett and Rocco caused to be delivered to Lichtenberg and Johnson, Boyes Springs resort.

(U. S. Exhibit 15 for Identification was received in evidence.)

Mr. Licking: Government's Exhibits 16 and 16-A, the Barotti transaction, handled the same way as the Johnson and Lichtenberg transaction, and 16-A, a receipt given by Rocco to Enrico Barotti for \$4,120, dated May 17, 1944.

(U. S. Exhibits 16 and 16-A for Identification were received in evidence.)

Mr. Licking: Exhibit No. 17 is the other one of the three Sonoma transactions, the transaction with Charles Ferretti, which has been identified as handled by Burnett, Rocco, and Mr. Malaby.

(U. S. Exhibit 17 for Identification was received in evidence.)

Mr. Licking: No. 18 for Identification is the

Elliot Smith transaction. (646-647) I offer Government's Exhibit No. 18, showing the invoice transaction under date of May 23. (647)

(U. S. Exhibit 18 for Identification was received in evidence.) (647) [211]

Mr. Licking: In connection with that same transaction I introduce the order blank under the stationery of International Import Company showing the inception of the transaction, April 8, 1944, and the order of 50 cases of McHenry whisky.

(U. S. Exhibit 18-B for Identification was received in evidence.)

Mr. Licking: In that connection I also offer Exhibit 18-A, which has been identified by James Gibson.

(U. S. Exhibit 18-A for Identification was received in evidence.)

Mr. Licking: Next, Government's Exhibit 19 and 19-A. Government's Exhibit 19 for Identification is the check made payable to Pete de Georgis. (647-648) * * *

(U. S. Exhibits 19 and 19-A for Identification were received in evidence.)

Mr. Licking: Government's Exhibits 20 and 20-A are checks signed by John Kusalo, one of them to the International Import Company for \$868.56, which is the amount collected in payment for the invoice price shown by Government's Exhibit 20-B, which I now offer.

Government's Exhibit 20 for Identification is a

check payable to Cash which has been testified as cashed and given to de Georgis in payment of the overage on the shipment described in Government's Exhibit 20-B.

(U. S. Exhibits 20, 20-A and 20-B for Identification were received in evidence.)

Mr. Licking: Exhibit No. 21 is the Abrams transaction up in Santa Rosa County which was identified by Mr. Malaby as a transaction which he handled in connection with the general scheme.

(U. S. Exhibit 21 for Identification was received in evidence.) [212]

Mr. Licking: 22 and 22-A are Mr. Malaby's letters of agency, one consisting of his agreement to work for the International Import Company, and the other a statement under the signature of the International Import Company, Burt Cain, that he is so employed.

(U. S. Exhibit 22 and 22-A for Identification were received in evidence.)

Mr. Licking: I now offer in evidence the franchise agreement whereby Burt Cain secured from the Midvalley Distilling Company the agency or franchise to distribute in the territory described, including this territory, the production of that distillery. When we originally discussed this, I have been told, we agreed there was no objection to the use of a copy rather than the original, or if you had the original we would put the original in.

Mr. Ames: I don't know if I have the original

or not. I will have to look in my file. The copy is all right.

(U. S. Exhibit 23 for Identification was received in evidence.)

Mr. Licking: Exhibit No. 24 is the picture of Mr. Malaby which it has been testified was used in the matter of identifying him as connected with some of the transactions. I will offer that as merely bearing on the identity of Malaby in the particular transaction.

(U. S. Exhibit 24 for Identification was received in evidence.)

Mr. Licking: 25, the Di Silva transaction, I offer first the order slip under the heading of International Import Company showing the order dated 4/14/44 for 10 cases of McHenry whisky; and the invoice and receipt subsequently issued for the transaction, dated 5/23/44. (648-649-650)

(U. S. Exhibits 25 and 25-A for Identification were recieved [213] in evidence.) (650-651) * * *

Mr. Licking: Exhibits 26, 26-A, 26-B and 26-C have to do with transactions with one Gus Goldstein. (651) * * *

(U. S. Exhibits 26, 26-A, 26-B and 26-C for Identification were received in evidence.)

Mr. Licking: Exhibit 27 is the Lester McWilliams case. There is an undated receipt for money delivered which has been identified, which is Government's Exhibit 27 for Identification.

(U. S. Exhibit 27 for Identification was received in evidence.) (652) * * *

Mr. Licking: Exhibit No. 28 for Identification is the telegraphic money order testified as received by P. Rocco after Burnett had called up the International Import Company.

(U. S. Exhibit 28 for Identification was received in evidence.)

Mr. Licking: Exhibit No. 29 for Identification is the letter dated June 27, 1944 from Mr. Malaby to Mr. Burnett. (652-653) * * *

Mr. Licking: At this point, your Honor, I will offer in evidence a letter dated June 27, 1944, from Charles Malaby, 2766 Matthew Street, Berkeley, California, addressed to Mr. D. Burnett, in Los Angeles, and identified here as given by Burnett to Rocco. That letter is offered as to all the defendants for the purpose of showing that the conspiracy had not terminated and that they were endeavoring to deliver the whisky, and in connection with the Government Exhibit just offered, the telegraphic money order identified as sent to pay for part of Barotti's claim on June 13th, to show that the conspiracy was still being attempted to be carried on.

(The letter was marked U. S. Exhibit 29 and read in [214] evidence.

Mr. Licking: Next, Government's Exhibit 30 for Identification, a receipt showing the payment of money from Charles Malaby on April 21, 1944, to one Leo J. Sargiani.

(The document was marked U. S. Exhibit 30 in evidence.)

Mr. Licking: That is the Government's case. We rest. (654)

Mr. Sheffy: At this time, your Honor, I want to present a motion on behalf of all of the defendants, jointly and severally, to strike from the record certain testimony as to conversations that were admitted by the court subject to a motion to strike, those conversations being the conversations that were had with some of the defendants with third persons not in the presence of the other defendants.

I think I can make the motion general after stating, making reference to the testimony of one or two of the witnesses. For example, the witness Steve Vincentini, who testified he contacted Mr. Malaby in his apartment and talked about whisky, that there was nobody present but himself and Mr. Malaby, and the court permitted the witness to state what conversation was had in Mr. Malaby's presence, subject to a motion to strike, and later he said as to the conversation with Malaby the motion would apply to all the defendants except the defendant Malaby. He testified that after talking with Mr. Malaby in his room that he then went to the office and talked to Mr. Files, Mr. Malaby and Mr. Shaeffer, and the court permitted, subject to a motion to strike, the conversation that was had at that place to be given, and in that instance the motion would be on behalf of the other defendants who were not present at that time.

The motion, therefore, is presented in each instance on behalf of those defendants who were not present at the time the conversations were had. I can go through my notes and take up each witness, witness by witness. [215]

Mr. Licking: I am perfectly willing to stipulate that we haven't introduced testimony relating to any conversation at which all of the proposed defendants were present. There has apparently been no such conversation.

Mr. Sheffy: That is true, Mr. Licking, but in order to have the matter straight in the record, instead of taking each witness, witness by witness, I believe that I can make the general motion on behalf of the defendants who were not present at conversations testified to by one or more of the defendants (sig. witnesses), when the other defendants were not present, and as to all of that testimony I present to the court now a motion to strike that testimony. May it be stipulated, Mr. Licking, that my motion goes to the testimony of all of the witnesses?

Mr. Licking: If it is agreeable to the court, and the record may also indicate that that objection has been introduced as to each conversation as to which there has been testimony, and the objection has been entered and a motion to strike is now made on behalf of those defendants who were not present at that conversation on the ground that as to them, I presume, it is hearsay.

Mr. Sheffy: Hearsay; and on the further ground the statements of one of the alleged conspirators

not in the presence of the others cannot be used to prove the conspiracy.

The Court: Is the matter submitted?

Mr. Sheffy: Yes, your Honor.

The Court: The motion will be denied.

Mr. Sheffy: Exception. (654-655-656)

Mr. Cannon: If the Court please, may I just offer this further suggestion, that with respect to the motion which is made on behalf of all of the defendants that we call your [216] Honor's attention particularly to all of the testimony that was introduced in evidence here bearing on any transaction or any conversation had, and also with respect to any documentary evidence introduced hearing upon a transaction subsequent to April 24, 1944, and make the motion specifically in behalf of each defendant not definitely connected by his personal presence with any transaction occurring subsequent to April 24, 1944.

Mr. Licking: You pick April 24th rather than the date you first indicated, March 10th?

Mr. Cannon: I want to say this: I picked April 24, 1944, for this reason, and I will argue at another time in the event your Honor will see fit to overrule this motion, or deny the motion. I pick that date at this time because that is the very latest overt act alleged in the indictment. As a consequence, if counsel has not yet proven a charge that the conspiracy existed on April 24, 1944 and that some overt act in furtherance of that conspiracy had not been carried out by that date, the prosecu-

tion must fail, and if at this stage of the proceeding your Honor feels that there has been a conspiracy shown to have existed between some or all of these defendants which conspiracy was in existence prior to or on April 24, 1944, and that some overt act was committed, one of the overt acts alleged in this indictment was committed by that date, then your Honor must necessarily dismiss as to all the defendants, or as to those against whom your Honor may fail to find a conspiracy existed. They cannot, in other words, offer evidence as being binding upon any defendant and as tending to establish any conspiracy, anything that occurred after April 24, 1944, because that is the last date charged in the indictment when an overt act was committed. If the overt act was committed on April 24, 1944, or any date prior thereto, the crime alleged in the indictment was complete, and, therefore, everybody was on their own from [217] that time out. (657-658) * * *

So, therefore, I move on behalf of each and all of the defendants to have stricken from the record each and every conversation, each and every transaction, each and every document bearing date subsequent to April 24, 1944, and I make that motion on behalf of each of them jointly and severally.

I might as well make another one, while I am at it. I also move to strike from the record—I make the same motion with respect to each defendant as to each transaction, conversation, and as to each piece of evidence, documentary or oral, which related to any transaction subsequent to any date

of the commission of any overt act which your Honor may at this stage of the proceeding feel has been established.

The Court: The motions, and each of them, will be denied.

Mr. Cannon: Exception in each case.

Mr. McDonald: May it please the Court, on behalf of the defendant W. O. Files I wish to adopt on his behalf and make part of this record each and every motion made by Mr. Sheffy and Mr. Cannon.

I further move to strike from the record all evidence, oral or documentary, in reference to the transaction involving the witness Figone, on the ground the same is incompetent, irrelevant, and immaterial, and hearsay as to the defendant Files, as the conspiracy or no part thereof has been proven.

I also wish to make the motion on his behalf on the same grounds in reference to the witness McNeil; upon the same ground as to the witness Pete de Georgis; upon the same ground as to the witness Pete Reali; upon the same ground as to the witness Bryden; upon the same ground as to the witness Manuel Costa; upon the same ground as to the witnesses Lichtenberg and Johnson; upon the same ground as to the witness Barotti; [218] upon the same ground as to the witness Ferretti; upon the same ground as to the witness Elliot Smith; upon the same ground as to the witness Caputa; upon the same ground as to the witness

Kusalo; upon the same ground respecting a man by the name of Abrams, from Santa Rosa; upon the same ground as to any transaction involving John Di Silva; upon the same ground as to a certain money order sent to the witness Rocco; upon the same ground as to the letter from Malaby to the witness Burnett; and upon the same ground as to any testimony in reference to a receipt from Malaby to a man named Sargiani.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. McDonald: Exception.

Mr. Gillen: May it please the Court, may I adopt Mr. McDonald's motions, excepting to extend that motion with regard to all testimony of all of the alleged or intended purchasers of whisky presented by the Government, here, on behalf of the defendant Shaeffer, and with regard to all of the exhibits on behalf of the defendant at this time.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. Gillen: Exception.

Mr. Cannon: If the Court please, on behalf of each of the defendants, jointly and severally, I make a motion at this time to dismiss and ask your Honor to acquit each and all of the defendants on the indictment on the ground, first, that the indictment does not state facts sufficient to constitute a public offense, or any offense punishable by the laws or the Constitution of the United States; on the further ground the indictment is not drawn

with that degree of certainty or exactness [219] required in criminal pleadings to enable the defendants to properly make their defense; on the further ground that the Government has failed to establish at this stage of the proceedings any evidence sufficient to enable your Honor to make a finding of guilty as against the defendants, or as against any of them.

Mr. Licking: Submitted.

The Court: The motions will be denied.

Mr. Cannon: *Exception*. Exceptions taken jointly on behalf of all the defendants, and separately for each defendant.

Mr. Sheffy: On behalf of the defendant Cain, I wish to adopt the motion made by Mr. Cannon, and also to move to dismiss on the special ground that as to the defendant Cain the indictment does not state an offense committed within the jurisdiction of the court. (658-659-660-661-662) * * *

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. Sheffy: *Exception*. (663) * * *

Mr. Cannon: If the Court please, so far as Mr. Nathan Newman is concerned, we rest. (663) * * *

HARRY DREWES MATTHIAS,
a witness for the Defendant, Burt Cain, being duly sworn, testified:

Direct Examination

By Mr. Ames:

My name is Harry Drewes Matthias, and I am

(Testimony of Harry Drewes Matthias.)

working with flux to fuse aluminum. I live in West Los Angeles. I know Charles Malaby, and I just passed him in the hall, but prior to that I met him in Los Angeles during the early part of the second week in January. I had a conversation with him in the [220] Biltmore Hotel. Someone else was also there but whether or not he heard the same statement I do not know. Charles B. Taylor was there. Malaby said at that time he was not worried about this indictment up north, as he had put it, he had some other people to blame. He said he could not stand any indictment on grand theft in Los Angeles, and he thought I was acting like a child.

Cross Examination

By Mr. Licking:

Taylor is a lawyer, but not my lawyer, but a friend of mine. Taylor and I and Malaby had an appointment to receive some money Malaby owed us for a business deal that Taylor had had with Malaby, and Taylor asked me to go with him to try to collect it, but the fact that we did not would make no difference in my testimony here. I am not friendly with Mr. Cain. I am not acquainted with his secretary. Monday was the first time I met her. I have been regularly and daily in company with Mrs. Anderson since the trial started—that is since last Monday. I only knew Mr. Cain since last Monday (676). I have never discussed with Mrs. Anderson that she is going to be a witness. She knows I am to be a witness, because I

(Testimony of Harry Drewes Matthias.)

told her. She told me she was going to be a witness, and I told her I was, too. We did not discuss between us the nature of the testimony we were to give. I saw Mr. Malaby yesterday for the first time around here, since I have been in San Francisco. I know Mr. Taylor is in San Francisco now, but I did not see him until 11 o'clock last night. He did not mention anything to me then about trying to collect any money from Malaby (678).

(Witness excused.)

BURT CAIN,

one of the Defendants, called on his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Ames: [221]

I am one of the defendants in this case, and live at 413 South LaBrea, Los Angeles, California, and my occupation—I was in the wholesale and importing business in connection with liquors. I have lived in California twenty-one years and have a wife and family. For about a year I have been in the wholesale business and about a year and a half in the importing business, and conduct my business under the name of the International Import Company. I have no partners, and my business is not a corporation. Before meeting any of the defendants in this case I was engaged in importing liquors of various

(Testimony of Burt Cain.)

kinds from Mexico and in selling to wholesalers, and I obtained a wholesaler's license under the laws of the United States and also under the State laws. The documents you have shown me is a wholesaler's basic permit, and an importer's basic permit issued by the Federal Government, and the California State Wholesale and Importer's license. (682) The wholesaler's basic permit from the Federal Alcohol Administration was issued to me March 6, 1944.

(At this point these documents were marked Defendant Cain's Exhibit D in evidence.) (682)

I first met the Newmans, Nathan and Morrie, about the middle of March, 1944; and Malaby about March 21, 1944. I had a conversation with the Newmans in connection with the securing of a license for the sale of whisky from the Midvalley Distilling Corporation and subsequently obtained a license and ordered a car of whisky from that company. It was to be purchased by me as a wholesaler and distributor through the regular channels to the retail trade. I made Nathan Newman sales manager of the company, and Malaby was a salesman on commission. I at no time had any conversation with Nathan Newman or Charles Malaby concerning the black market in liquor (683). There was no discussion with reference to the matter of charging any [222] overage on the sale of liquor; and no conversation was had by me with them on that subject. I at no time received any overage on the sale of liquor, and knew of no one else who was receiving any such overage.

Mr. Cannon: If the Court please, may we under-

(Testimony of Burt Cain.)

stand again, since Mr. Newman has rested, that I therefore don't feel under the necessity of making objection to this testimony. If your Honor requires me to do it, I will do it.

The Court: There is no necessity that I see. Proceed. (684)

(Witness continuing:)

I first suspected any persons in my employ as having illegal transactions in liquor about the middle of June, when I was in New York. I left to go east about June 9th or 10th, and returned July 4. I first gained these suspicions from newspaper clippings that had been mailed to me about the arrest of Mr. Malaby in San Francisco in connection with black market activities (685) and returned to Los Angeles and had a conversation with Malaby about it at my office, in the front office, and also in the back of the office. I did not see Mr. Malaby from the time that I gave him a letter of employment, about March 22, and the time that I saw him in the railroad station as I was going east. I did not see him to exceed twice, the whole time. Once I took him in the room in the back, upstairs, and told him I wanted to talk about the black market activities, but this was not between March 22 and July 4. I took him into that back room after I returned from New York in July. I had a conversation with him. Newman was there. Miss Anderson was there on several occasions, just for a few moments, and went out again. I asked Malaby where this black market had taken place, who got the money, and what became of it, and why it had

(Testimony of Burt Cain.)

been perpetrated on my license. He admitted that he had done it, and would not explain where the money had [223] gone. I demanded that the money be returned, and he said he could not return it. There was some conversation about my putting up some money for Malaby, because he wanted money for himself, claiming large commissions. I pointed out the record that he had no commissions coming at that time, that he had overdrawn himself, and I would not advance him any further moneys. There was a conversation about attorney's fees. He said he had to raise \$5,000, as a retainer for an attorney, and wanted to know if I would loan it to him, and I told him "no." Subsequently, he came in again and I told him I did not have \$5,000 to give him for his lawyer. He asked me that if he sold my license for a large sum, if I would pay him \$5,000, and I told him that I would. But he never did sell that license for that amount. He did make some threats against me if I refused to put up the money. This was in the latter part of July, or the first of August (689), while Miss Anderson was there with Malaby and me. Malaby said that if I did not put up money to help him out he was going down and incriminate me with the black market operations which he had been making in San Francisco. I told him that the Alcohol Tax Unit were at that time auditing my records, and I would be glad to have him tell them in my presence what he had said, and offered to make an appointment for the next morning so that he could tell all he knew to the tax people. Malaby did not show up. The Alco-

(Testimony of Burt Cain.)

hol Tax Unit were at that time making an audit of my books. A Mr. Williams Clements was there and the other man's name was Harold Rassi (690). I have in Court my books of accounts which were kept by Mrs. Anderson and a certified public accountant (692), and I am ready, willing, and able at this time or any other time to submit them to Mr. Bird or any other recognized officer of the United States Government for inspection. The books that you show me are my [224] Journal and Ledger of the International Import Company, and miscellaneous records from the files (693), and they are the principal books of the Company.

Mr. Licking: I was just offering to make a stipulation with regard to these books which I think may satisfy him. I have no doubt but the witness on the stand and Mrs. Anderson will testify that these books, as here submitted, show no illegal transactions, no black market transactions.

Mr. Ames: You say you would stipulate to that?

Mr. Licking: I am perfectly willing to stipulate that these books, as shown here, show no such transactions, yes.

Mr. Ames: Very well. Then I shall have to go to the next question.

Mr. Licking: And Mrs. Anderson will so testify, and the witness on the stand will so testify.

Mr. Ames: We will take the stipulation and go on to the next step. I am offering the books in evidence.

The Court: Admitted and marked.

(Testimony of Burt Cain.)

(The books of account were marked Defendant Cain's Exhibits E and E-1.) (695)

(Witness continuing:)

Besides these books I have invoices and bank accounts which reflect the moneys that were received by me in the course of these sales of McHenry Reserve. I do not have the bank accounts with me, but I am willing to produce anything of that kind that I have. I did not at any time receive any money from Malaby or from anyone else concerning or having to do with any overages. I never at any time received any part of the \$10,000 received from Spenger. There is no truth whatever in the statement that Malaby made that \$1500 was split in equal parts of \$500 between myself, Malaby and Newman, in the Palace Hotel. I have never before in Court seen Mr. Cardinelli. I heard him testify that when he was in the [225] Palace Hotel I was lying on the bed in that room, but I did not see any such person as Cardinelli. I never at any time told Malaby that there was being paid to the Distillery a total of \$72,000 to purchase a car of whisky. At the Palace Hotel I did not at any time hear anybody say anything about collecting any money or overages (697). I discharged Malaby about June, 1944, in Los Angeles. No, I am wrong, it was July 18, 1944. At that time there was considerable recrimination and some unpleasant rejoinders, to the effect that he would ruin me; Miss Anderson and Mr. Newman were present when I had that con-

(Testimony of Burt Cain.)

versation with Malaby. I told him that he must leave immediately. He was in my office about the middle of August, 1944, in the presence of Mrs. Anderson; and Malaby said that I had never received a dime of the black market money and that I knew nothing of the transactions because they had all taken place in San Francisco, and I had no knowledge of them. There have been no complaints about any transactions that took place in Los Angeles, as far as I know. I recall a transaction involving a check of \$904 from the Lake Inn Corporation (698). I have never seen that check. Mr. Malaby admitted to me that he took the check, endorsed it and put the money in his pocket without my permission; and I told him he would have to refund the money. Before this court proceeding I never did see Government's Exhibit 4-B which is a letter signed by W. H. Benson, under date of May 3, 1944, together with the envelope. I did not know until recently that that letter had ever been delivered to my office. Malaby came to Mr. Mathes' law office on the 13th of this month, and stated that he had stolen the letter off my desk, and that he was going to use it in the pending trial against Mr. Benson. I asked him where the letter was and he said that I did not know anything about it. He had seen it [226] on my desk and had put it in his pocket and walked out (700). He made that statement in the presence of Burke Mathes, who is my personal attorney, and who is in the court room. Malaby at that time said that if Benson gets on the

(Testimony of Burt Cain.)

stand and testified about the Spenger matter, he would use the letter as it would hurt him, Benson. I never had the letter in my possession and never saw it until I came into this court room. I never at any time entered into any conspiracy to violate the law of the United States respecting the ceiling price of liquor; and I never at any time sold any liquor above ceiling price to anybody. The only whisky at any time that I had was McHenry Reserve, and I had never even heard of Doggerty, or Rocky Creek, or straight whisky (701). The only whisky at any time that I never had was the blended McHenry Reserve which was embraced in the car-load that was condemned. On March 10, 1944, I did not know either Nathan Newman, Charles Malaby, R. H. Shaeffer or Walter O. Files; I did not on that date meet or conspire with them. On March 11 I was not present at any meeting in San Francisco with them. I never did know the defendant Lowenthal. I believe I first met him here in the hall of this building. He was never employed by me, as a salesman or anything. I never did know in Oakland James Gibson and Elliot R. Smith (702). I never had any transaction with them at any time unless they were in my files as purchasers of whisky at ceiling. I never saw Martin Fuchslin, or Robert C. Thomason. I was never on the premises at 309 Kearny Street, San Francisco; and was never in the premises occupied by Frank Spenger in Berkeley. I do not know him. I only received an invoice from him. He bought 50 cases

(Testimony of Burt Cain.)

of whisky from me at ceiling, and he is a complete stranger to me.

Cross Examination

By Mr. Licking: [227]

The first time I ever suspected there was anything wrong in this series of transactions was when I was in New York, sometime in July. I have known Benson casually. I did not receive that letter from him regarding the Spenger transaction. After July, or during the month of July, I received several letters from Benson. I first talked to Mr. Mathes about this case when I returned from New York. I did talk to him over the long distance phone from New York. After looking at Government's Exhibit No. 31, dated 6/24/44, I do not wish to change my testimony to the effect that the first letters I received from Benson about the Spenger deal were in July. That letter, Government Exhibit No. 31, never reached me. I did not say that I had never heard any repercussions about the Spenger deal until I returned from New York. I had never received any complaints from Mr. Benson in that connection until after I returned from New York. I had a telephone call from Mr. Files in New York, who had received my address from Mr. Mathes. I did not know Files at that time. I asked Files over the phone who he was, and what it was about. Files did not tell me he had received for the account of International Import something like \$13,000 from Mr. Malaby. He did mention the sum of \$13,000, but I told him I knew nothing about it at all

(Testimony of Burt Cain.)

(706). That was while I was in New York, sometime after the middle of June. I notice that Exhibit 4-A and Exhibit 4 of the Government's, the check and receipt, that the check is dated April 24, and that the perforation on the check shows that it was cashed about the 26th. I also note the date on Mr. Files' receipt. I never saw it before. The first time I heard about this was when I was in New York. I had money of my own to go into this business and to buy a carload of liquor. That money was in the bank in Los Angeles; the Bank of America. I think I had when I started in this business [228] about six or seven thousand dollars in cash and credits. When I first made my original application for a liquor license it was not refused. There were two or three people who offered to lend me money. At the time I made my application for Federal and State license, in 1943, there were several people who were going to lend me \$50,000. I am trying to recollect who they were. One was Max Shulman (709), a prominent owner of the International Provision Company. He introduced me to another man, but I cannot recall his name. I did not get any money from them. I borrowed money from James Lee and from Marie Marble, and I had moneys coming to me from credits in Mexico. My first license for the liquor business was in March, 1944; it was a Federal license. The California license was dated November, 1943. I was working for Willard Marble at the Latin-American Exporting Company at the time, before my Federal

(Testimony of Burt Cain.)

license was issued. I was working on a commission basis (711). I knew in the course of business transactions that Mr. Spenger had ordered some liquor from me, because I had an invoice for it. I did not have the original order slip and never saw it. I did see the invoice dated May 23, which is Exhibit 4, dated in May sometime. That is the first time I knew about Mr. Spenger. I deny that I ever saw a duplicate of the order which is Government's Exhibit 4-B. The first thing I knew about the Spenger transaction was when I received the executed invoices for shipment marked May 23. We never took orders as distinguished from executed invoices. We did take orders, in all cases. The document marked "Customer's Copy" is an invoice (715). Our customary course was not to take an invoice at the outset of any transaction, but to have an order executed. The first document which you have shown me stipulates at the bottom, "This is an order, merely an offer to purchase, and is not [229] binding on the International Import Company until signed by Burt Cain, sole owner." This is an order. This is the first paper that we customarily caused to be executed. When I first started in the wholesale business, not the importing business, I caused these forms to be printed up. They were the only items I had on which to take orders in the wholesale business. About the 14th of April I discontinued the use of these types and substituted the one which you now show me, and I so notified the salesman. Thereafter I discontinued the subsequent

(Testimony of Burt Cain.)

one because it was not proper. The first form of order we used is that shown on 3-B. There were three colors, white, yellow, and green, and were for the customer, the salesman, and the office. That is one of the first forms. Then I used the second one. I do not find any of those here (720). The one you now show me is the final one, and it is dated 5/23/44. That form is the only basis upon which I would accept an order, and is the form we used in confirming an order. 3-B is the form we used at the beginning, when I started, and was used during the first part of April. April 14 I ordered them discontinued. In other words, I secured this particular invoice order form, identified in Government's Exhibit No. 4, and required them to be executed in all cases where I had received other sales documents. I have a consolidated sheet that would be simpler in showing the orders that I confirmed, as reflected in my books, and this list discloses the different orders which I received and which I accepted for McHenry whisky during the period of time that I was in the wholesale importing business. It shows the order from Steve Vincentini (722). This list runs from May 24 to June 5. Prior to May 24 I received orders on these other forms and returned them. Referring to the Spenger case, it is not a fact that before sending the invoice back to Spenger to be [230] executed by him, I received another order. I never saw that order before I came here. In the Vincentini case I never saw an ordinary sales slip showing "no

(Testimony of Burt Cain.)

cash down.” (723) I cannot remember whether in the McNeil transaction I received an ordinary sales slip or an invoice, but in those cases where I returned the documents, and where I accepted the orders, I initialed the documents before they were returned. It is not a fact that I received from Mr. Malaby and Mr. Newman an equivalent of an order for merchandise showing “No cash down.” In no case did I ever receive any overage; and I knew of no overage until sometime when I was back in New York to exchange a carload of whisky which had been condemned by the Board of Health in Los Angeles. I never had received any complaints by anyone who had theretofore deposited any money with Malaby, Newman or Files, and knew nothing whatever about that before I went to New York (725). Concerning the money which I put in this business, I said I had approximately \$6000 in cash besides moneys which I had borrowed from personal friends, and besides credits which I had in Mexico with which to start into business. I borrowed \$5,000 from Nathan Newman. Mr. Newman and I never talked about black market money and I never knew anything about it. When Malaby made threats against me I felt very unkindly about it, but I was not timorous or fearsome (725). I had a perfectly clear conscience then and I have a clear conscience now. I knew nothing about overage. Malaby attempted to get money from me by one threat or another, and I refused to advance him any money. I spoke to Ehrlich at the request of Malaby, who

(Testimony of Burt Cain.)

had told me that he, Malaby, was going to sell my license for \$30,000, and wanted to know if I would give him \$5,000 if he did sell it for \$30,000, and I told him I would. I also told him if I sold it for \$15,000 I would still give him \$5,000; and that I thought he was romancing (727). [231] I told Mr. Ehrlich that. I wrote Mr. Ehrlich that I would pay him \$5,000 for Mr. Malaby's defense, but made no reference in that letter about selling anything.

Mr. Licking: I offer this in evidence with reference to this defendant only.

(This letter was marked U. S. Exhibit 32 in evidence, and was read by Mr. Licking.) (728)

(Witness continuing:)

Ehrlich and I had a subsequent talk in his office to the effect that I could not and would not become a party to paying his law fees at that time. Mr. Ehrlich stated he wanted \$5,000 as a retainer and perhaps \$10,000 or \$15,000 for a fee. I told him it was impossible for me to loan money to this man, guilty or otherwise. I told him that if I did not receive the money from the sale of that license within a week, I would have no part of it. At the time the letter was written I was in Mr. David Cannon's office, and I dictated this letter and left it in Mr. Cannon's files. The letter was never directed to, or mailed to Jake Ehrlich, so far as I know. Later, I wrote another letter to Mr. Cannon requesting that the letter be not forwarded to Mr. Ehrlich, and stated my reasons therefor, because I did not want to have anything to do with it.

(Testimony of Burt Cain.)

I think Mr. Malaby got a copy of that letter from Mr. Cannon's secretary without Mr. Cannon's knowledge. That is what Malaby told me (731). I had commissions in excess of \$20,000 coming to me from Mexico, when I started this business. Part of them were paid by Mr. Marble and the Latin-American Export (732). I would say, roughly, I collected \$4,000; that is within \$500 of what I collected. I did not deposit it to the account of the International Import Company. I made some of the payments that I made on behalf of the International Import Company from my own personal account, and some from cash [232] I had on hand. The money which I put into the Importing Company was partly, \$6000 in cash, and part in proceeds from commissions afterward collected from Mr. Marble, and from Mexican concerns with which he is interested, and some from cash I had on hand, and \$5000 which I borrowed from Morrie and Nathan Newman. I did not bring my bank accounts and statements of the International Import Company with me to court. I had no idea that I would be requested to produce them; but I brought my books. Every deposit that I made on account of the International Import Company is covered by a deposit slip. I think the books would show whatever money came from me personally. I got some of the cash from James Lee. He would not have a record of the money that I had of my own. James Lee loaned me between \$8,000 and \$10,000. I paid the invoice price of \$42,000 plus to the Distillery

(Testimony of Burt Cain.)

for the carload of liquor, plus the freight and the handling charges. I do not remember the total amount I paid. The invoice that I have here which is Defendant's Exhibit for Identification shows the cost, but that is not the total cost. There was paid to the railroad company about \$1200; and \$600 or \$700 to the warehouse company, and \$600 or \$700 or \$800 to transportation companies, and other legitimate expenses. I did not send Morrie Newman any money for any transaction in connection with this matter with a representative of the Mid-valley. The 2500 sent back to pay for the franchise is a different story. I sent that \$2500 to the Mid-valley Distillery, Incorporated, direct, by cashier's check. I did not send it to Newman to deliver to them. Subsequently, they sent the check back and asked me to make it to I. A. Needleman (740), so Needleman eventually got the money as he was the agent for the distillery. I did not make out my check for the whisky to Needleman, but made that to the Distiller. [233] I paid \$125 a week to Morrie Newman when he worked for me, as a salary. He was going to be the purchasing agent for us. It was presumed that I was going to get a carload of whisky every month. In the license itself, the distillery and Needleman both agreed that as soon as they could turn out whisky fast enough, and we could use it, we would receive it on an increasing amount month by month, so that eventually I would be getting a car about every two weeks, and if that was true I would need Mr. Newman to look after

(Testimony of Burt Cain.)

that whisky for me in the east, and also to buy other whisky from other distillers. Newman said that he knew a number of people in the east with distilleries, or who were officials of distilleries, and he hoped to be able to go back and get whisky. I heard the testimony of Goldstein and Williams in the transactions here.

(At this point a paper, identified by the witness and headed "Those entitled to merchandise exchange," was marked U. S. Exhibit 33 and admitted in evidence.) (742)

Acting on the assumption that I could get a carload of whisky every two weeks, I thought I could use Mr. Newman for the purpose of having him go down east to Chicago, New York, and other places, to buy whisky, and I thought it would be worth \$125 a week to employ Mr. Morrie Newman for that purpose. That was all Mr. Newman would have to do. He had nothing whatsoever to do with any local sales. From the first part of last year up to July, 1944, I was in San Francisco possibly twice. The first time I was here I think I stopped at the Sir Francis Drake Hotel. The second time I was here I could not get a room so I went to Nathan Newman's room at the Palace, sometime during the month of May, but I am not sure of that. My purpose in making the trip to the Palace Hotel was not to make out the [234] invoices from the sales slips, referring to Exhibit 3-B. These invoices were not made out for the most part at that time at the Palace. I did not see Jack Cardinelli at the Palace

(Testimony of Burt Cain.)

when Malaby and I were in the room there. I do not recall any occasion when Malaby, Nate Newman and I were in a room at the Palace Hotel, and Newman was at a typewriter making out invoices similar to those shown on Government's Exhibit 4 for Identification. Those invoices were all made out in my office in Los Angeles (745). They were executed in Los Angeles after I had received the signed orders. As I explained earlier, my purpose in using the documents such as Exhibit 3-B, was that I allowed him, Mr. Malaby, to use those blanks on which to fill out an order. At first Malaby was taking orders, so he told me, on some sort of a book that he had. Then I told him, by letter, to discontinue the use of those particular blanks, that they were not adapted for this business, and I changed the order form, and ordered all orders written up on that form—such as shown in Exhibit 4. It is not a fact that forms such as Government's Exhibit 3-B and similar orders were taken with a statement, "No cash down" on them, and the overage deposited at Files' office with my knowledge, and that then this, referring to Government's Exhibit 4 in evidence, executed as a cover-up for that transaction afterward (747).

Cross Examination

By Mr. McGuire:

The name of Oscar Lowenthal does not appear on the books of my company as a representative or salesman of the company.

(Testimony of Burt Cain.)

Cross Examination

By Mr. Licking:

There are no other conscious omissions on my books besides that of Lowenthal's except the name of Malaby. Nathan Newman appears as sales manager for the company; Morrie Newman was the purchasing agent, and he is the man who went back east [235] to buy the whisky, at \$125 a week. He did not stay in the east; he came back to Los Angeles. He returned to Los Angeles, I think in April, or sometime in May, and made his headquarters at the International Import Company. He looked after local purchases, small supplies and stuff we needed for the business, and sent out letters and circulars to various distillers. He called them up by long distance, in an effort to buy whisky at the ceiling. He interviewed various distillers around Los Angeles and did some business. I sold some McHenry Reserve in Los Angeles. I think about four or five hundred cases. We had salesmen there, one was named Erskine, another named Brown. Nathan Newman was sales manager. I never saw him take an order. I was only in San Francisco once with Nathan Newman. I was also up here along about January or February, but prior to the time when I saw these gentlemen, Newman and Malaby. It was not in connection with the liquor business. I first met Morrie Newman and then a couple of days later I met Nathan Newman. They did not tell me that they had participated in any orders in San Francisco for whisky

(Testimony of Burt Cain.)

for which they had collected over \$12,000 in overage. The first time I knew of it was sometime when I was east, in June. Benson wrote me two letters in New York, and sent them directly to me. I talked to Mr. Mathes about Mr. Files' telephone call to me. Files phoned me when I was in New York, and then after that. That was the first that I had ever heard of Files.

BURKE MATHES,

called as a witness on behalf of defendant Cain, being duly sworn, testified:

Direct Examination

By Mr. Ames:

My name is Burke Mathes, and I practice law in California, and have an office in Los Angeles, and have lived in Los Angeles sixteen years. I know Burt Cain and I am his personal attorney, [236] and have been for three years. He consulted with me concerning the obtaining of a wholesaler's license, and I assisted him therein by preparing the necessary paper and in drawing up the various forms, etc. I added to the forms the feature that no order would be binding on the International Import Company unless countersigned by Mr. Cain. I was not present at any conversations at which Malaby was also present, that had to do with the question of the black market. I have met Malaby. I have spoken to him in the hall here twice during the last few days, just to pass the time of day.

(Testimony of Burke Mathes.)

Malaby met Cain and me in my office on the afternoon of January 13. No one else was present. This was in 1945. Cain had told me that Malaby wanted a meeting, and I suggested that if he met him at all he should meet him in my office. Malaby came in and stated at that particular time that he was dealing in the disposal of surplus war products, and that he was out of the liquor business. He stated he had paid Mr. Ehrlich his fee and proposed to plead not guilty in this case, and then he brought up the subject of the Benson letter that has been introduced in evidence here, U. S. Exhibit 4-B. I did not see the letter at that time, but Malaby stated that in regard to the trial of his case that if Mr. Benson appeared against him that he had a letter in his possession that would offset any statement that Benson might make (753). He said that he was in the International Import office one morning prior to Mr. Cain's coming there, and he knew the letter was coming because it contained the order referred to in the letter; that he was the first there and picked the letter up. He did not state that Cain had never seen it. He just said he took the letter. I wrote U. S. Exhibit 31. During Mr. Cain's absence his office communicated with me and said that there was a letter out there in regard to one of the transactions, and that they were [237] going to mail it down to me, and asked me to acknowledge it. I wrote Mr. Benson this letter you just handed me, after receiving the other one. I wrote the letter because of Mr. Cain's absence I had the courtesy

(Testimony of Burke Mathes.)

of acknowledging that letter. During the meeting in which Cain, Malaby and I were present, I do not believe anything was said about black market collections. The only thing that I believe that was said was that Mr. Malaby said that Cain didn't have anything to worry about by reason of the coming trial. He did not elaborate on that statement.

Cross Examination

By Mr. Licking:

Mr. Malaby merely said, with respect to Exhibit 4-B, that he had gotten the letter from the International Import Company; that he was in there before Mr. Cain came down that morning and took the letter. He did not say whether the letter had been opened or not and made no statement about whether Cain had ever seen it. He did not show me the letter at that time. I believe he stated that the letter was in the hands of Mr. Ehrlich. I have never seen the letter myself before I came to court. In my letter to Mr. Benson I referred to a letter of a later date. As I recall it was a letter in regard to the fact that one of Benson's friends had had some whisky seized by the State government. That is the best of my recollection. I have known Mr. Benson about four or five years I believe. He officed in the same building that I did, and I had a casual acquaintance with him. I believe Mr. Benson wrote me one more letter besides the one that I wrote him, concerning the Spenger matter (755). In that letter there was something to the effect that Mr. Spenger wanted his money back that he had

(Testimony of Burke Mathes.)

deposited with Files. In fact, I had forgotten that letter until Mr. Benson showed it to me out in the hall yesterday, and I asked him then what was in the letter. I had [238] forgotten the incident entirely. The letter that I got from Mr. Benson came in about the time Mr. Cain returned from New York. I am sure I have never seen Exhibit 4-B; but after I had written my letter to him, I believe I had another letter from Benson.

(Witness excused.) (757)

Mr. Ames: If your Honor please, the defendant Cain rests. (758)

OSCAR R. LOWENTHAL,

one of the defendants, called in his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. McGuire:

My name is Oscar Lowenthal and I live on Grove Street in San Francisco, and I am an electrical and an art designer. At the time I met Malaby I was working as an electrician, and contacted him through an advertisement in the newspaper. He came to see me about the middle of January, 1944 (763). I had never seen or heard of him before. Malaby asked me if I had any knowledge of whisky sales and I told him I had, because I had sold whisky in Vancouver, B. C. He wanted me to go to work for him and asked how soon I could start. I

(Testimony of Oscar R. Lowenthal.)

told him I would not be able to start until sometime in March. He told me he was going to have a warehouse in San Francisco and I would be doing business in San Francisco under him as the general manager. He told me he had a thousand cases of Ten High quarts on hand, and he had McHenry Reserve, Benjamin Franklin whisky, and one other brand, Mid-Valley, and Rock Creek (764). He gave me prices from \$48 to \$51. The McHenry was \$51. He said I would give 5 percent of my sales as a commission. He was to get me some cards, some stationery, letterheads and envelopes, and an office location, and I was to go out and canvas to get customers and turn the customers over to him by giving his card to the customers, and he would call on them. He was to close every deal, and I was not to close any or to accept any money. Nothing was ever mentioned about the OPA price. When I got ready to go to work he changed the price. This was about the 22nd or so of March. Between the time I met him in January and the 22nd of March [240] I met him several times. He came to my house one time with Mr. Newman and introduced Newman to me as the sales manager. McKinnon was there then. That was in February, I think. Newman told me that they were going to have a distribution here and he didn't do much talking. Malaby did all of the talking. Newman was introduced as the Sales Manager for the International Importing Company. I wrote a letter to the State Board of Equalization. I was to get a letter from the Inter-

(Testimony of Oscar R. Lowenthal.)

national Import Company showing that I was a representative of that company. I talked with McKinnon and Malaby in my apartment. Malaby told me that if I knew anybody else who could be a salesman, to let him know; so I brought McKinnon in, and he got the same instruction from Malaby that I got (767). We got one price from Malaby and in one instance I had quoted the \$51 price to a customer. Before I actually went to work for the firm I investigated it through my brother in Los Angeles. I wrote the State Board of Equalization, as Mr. Newman had mentioned that it would be a good idea if I got a distributor's license, and I wrote to the Board of Equalization and asked them what I could do to get a license. Sacramento referred me back to the Equalization Board in San Francisco, and they told me to get a letter from the International Import Company to go to work. I tried to get the letter several times from Mr. Malaby, and made a special trip to Los Angeles. I phoned several times to the International Import Company and could not get hold of Mr. Newman or Mr. Cain. I never met Cain there. I saw Miss Anderson in the office, and she gave me a few sheets of paper and I wrote Newman and Malaby and told them I was there and wanted some information. I took the letterheads back to San Francisco, and I wrote out the kind of a letter that I wanted, on the stationery of the International Import Company, [241] and this is the letter that I wrote.

(Testimony of Oscar R. Lowenthal.)

(The document was marked Defendants' Exhibit F for Identification.)

(Witness continuing:)

After I had written out the letter I talked with Malaby about it and asked him to get it signed; and I told him I would not go to work until I did get it signed. He kept stalling me, that he had to have Mr. Newman sign it, and I never did get the letter signed.

(The letter was marked Defendants' Exhibit F in evidence.)

(Witness continuing:)

The first transaction I was interested in was with Mr. McKinnon in connection with 25 cases at the Red Raven Bar. That was the Becker deal. I simply went up to find out how much money was to be paid down and tell Mr. McKinnon where to take it because he had not been to 309 Kearny Street and Malaby had introduced me to Mr. Shaeffer. I was introduced to Shaeffer in connection with the Red Raven deal, and not with the Thomason deal (773). I first learned of Shaeffer or Files a few days before the Red Raven Bar deal. When I first met Malaby in January, nothing whatever was said about Files or Shaeffer. I did not hear about them until sometime in March. Malaby took me down and introduced me to Shaeffer, but never to Files. I never saw Files. He told me if I had money to put up, and he was not around, to take it to Mr. Shaeffer's office; that is, to take the customer there,

(Testimony of Oscar R. Lowenthal.)

and he would do the rest. Malaby had told me to get as close to half the money down as possible; but that he would do the closing of the deal. Becker had given McKinnon \$300, and I told him that he knew where to take it. He said that he did not; that he had not been down there yet. I told [242] him to take it down to Mr. Shaeffer's office on Kearny Street. That was the only connection I had with that deal. I did not have anything to do with the Thomason deal at all, and never met Thomason in El Cerrito until I had been out one Saturday and walked in there to have a drink. He asked me where Malaby was, he had a customer for some liquor, and I asked him why he did not give me the order so I could get a commission on it. Then the bartender introduced me to Thomason. That was the first time I had seen him. I told Thomason I was connected with the International Import Company, and handed him Mr. Malaby's card, because that was my instructions. He asked me what the price was and I told him he would have to get the price off of Malaby because there were some new prices being made. I made an appointment, and Thomason met Malaby at the O'Brien Bar the next day. Thomason did not have his money with him that date so he said he would see us the next day. And the next day Malaby showed up. Malaby took Thomason into Files' office and sat down as if he owned it. That was the first time I had had any transaction in Mr. Files' office, and Malaby told me that that was his office (776). I first walked into

(Testimony of Oscar R. Lowenthal.)

the office and Thomason sat on one side of Mr. Files' desk and Malaby on the other. The money was taken out. I was outside prancing around the gate. I never heard what the price was between Malaby and Thomason, but Malaby called me and asked me how much I told this man he was to pay, and I told him he was to pay \$57.50. Malaby closed the transaction. [243] Shaeffer was not there. I saw Malaby make out the receipt, and then Files came in, but I never saw the receipt myself. I was not one bit interested in the Elliot Smith transaction. I met a man named Navinger and he told me about Smith wanting whisky, and I told him I wanted to make a commission, so I told him I would go over and talk with Smith. Later I went over and saw Smith and his partner, but Smith did no business with me. Navinger told me he quoted him a price of \$60 and I should keep my nose out of it because he could get more. I had nothing more to do with the closing of the transaction. Malaby closed the transaction and collected the money. I never did see, until I came here to the court room, Government's Exhibit No. 18-A, a card with writing on it. It is not my handwriting and I did not give that card to Smith or to anyone else. The first time I heard of the Joe Di Silva deal was when Malaby got an order for ten cases of whisky and asked me if I would go over with it and deliver it, and collect \$65 a case for two cases of Rock Creek; and I went over with that whisky with the delivery man, and collected cash from Mrs. Di Silva amounting to

(Testimony of Oscar R. Lowenthal.)

\$130 for two cases of Rock Creek whisky. Malaby gave me \$10 on that transaction and that was my only connection with it. I did not take any order at all for any McHenry whisky. Later I took Malaby into one of Di Silva's places, and he signed Di Silva up; but I would not bother with it. I received an open bottle of whisky from Malaby as a sample. I took the labels off the bottles of whisky that Malaby gave me, and made up a little booklet to show to my customers. In the back of that book is a typewritten list labeled, "Cost of McHenry Bourbon Whiskey." Malaby had written out on a piece of paper how he had arrived at the price of \$57—the breakdown is what he called it, and I put it in the book and turned it over to [244] the customer at the same time to show them. That was the exact copy of the list that Malaby gave me. When Malaby gave me the list I copied it into this book. This list shows that the first cost of the whisky at Archibald, Penn., was \$44.56 a case, and the additional handling cost was \$12.94 (783), to cover the Los Angeles company's taxes, watchman's fees, bonded warehouse cost, State of California fee of \$1.92, hauling from warehouse to distributor's location, 50 cents a case—15 percent of the order, on an average, went to the distributor, which is an average of \$3.90. Railroad freight from Archibald to Los Angeles, \$1 a case. Hauling charges from Los Angeles to San Francisco, \$1 a case. Sales manager's 5 per cent, or an average of \$1.50 a case. Gas, pas-

(Testimony of Oscar R. Lowenthal.)

senger car, fares, and transportation, average \$1 a case. Total, \$12.94.

Mr. McGuire: We will offer this in evidence, if the Court please.

The Court: It may be admitted and marked.

(The book was marked Defendants' Exhibit G in evidence.) (784-785)

(Witness continuing:)

Prior to the time that I received that list from Malaby I had a conversation with him in my apartment and I told him I couldn't sell any whisky, that it was too high; and I never went out to sell any more; and I asked him again for my letter. He told me that was the price, and if I did not like it to go to hell. I told him I could not sell any more whisky at that price because he had raised the price on it two times. I told Malaby that I could not sell whisky at that price because I had to have something to show the customer why it was \$57.50, and he told me to tell the customer to go to hell. (786) At that time he gave me the list, and figured out to show why [245] I should get \$57.50. He never mentioned OPA or overages to me at any time. He promised and promised shipments of whisky. He said it was in a flood, and it was away too late. All of this time I was getting the devil from the people I had contacted for their whisky. I went up to the OPA to ascertain if McHenry whisky was on the market, but before that I went around to at least 50 bars in Oakland and Berkeley and San Francisco trying to buy a drink of McHenry, and I

(Testimony of Oscar R. Lowenthal.)

could not find a drink. Later I went up to the OPA and asked about it. I wanted to see if I could get some information as to the McHenry whisky. Malaby had told me it was coming and brought me another sample in a mason jar. He told me it was from another bottle and to use it for samples. Instead of that I drank it. The OPA told me that they had never had McHenry whisky listed, and he looked at some book there and he said that they did not have it listed and he couldn't give me any price on it. I looked in half a dozen beverage magazines and I could not find McHenry whisky. In the course of my travels I secured Defendants' Exhibit A. I got that when I left the OPA office, when I met a man who was getting some prices, and he asked me why I did not get an OPA price list from the supply department upstairs. I went back up to the little window and asked for an OPA price list on whisky. The lady told me they had none. This was about the time after I had made the Thomason deal. The man told me I could get a list, if I would go to a certain place. I went down to 539 Kearny Street and asked if I could see a list and get the information. There were other brands on the list but I never saw any McHenry on there. I told Malaby about it and he told me he was going down to Los Angeles and coming up with truckloads of it, and would bring me a case of samples; and he told me as far as the price is concerned the OPA had nothing to do with his McHenry whisky. [246] I believed him. I was interested in the McNeil

(Testimony of Oscar R. Lowenthal.)

transaction (790). Newkirk was acquainted with Mrs. McNeil and I told him if he could sell some whisky I would give him 5 percent. I told Malaby who was leaving for Los Angeles that I did not want to lose my commission on the deal. He said he had to go to Los Angeles and was coming back with two truckloads of McHenry. I asked him for two signed contracts. He gave me three or four, and told me what the price was. He signed them in blank. So when Newkirk called me and told me that Mrs. McNeil wanted to see me I went over there, and he introduced me to her, and she told me that her arrangement with Newkirk was that she was to pay \$57.50 a case for 200 cases, and wanted to know how much money she was to pay down. I told her to pay half down, if she could, because that was the way Malaby had instructed me. She gave me \$4380 and some odd, at first. I gave her a receipt and the contract that Malaby had given me and put in \$11,400. I took the money, and because Malaby was not here, I put it in my vault on Monday morning. Four or five days later, Malaby came back, and by that time I had found out that Mr. Malaby had to refund the money on the Red Raven Bar; and I figured that if they had to refund the money to the Red Raven Bar I would hold the money until I found out why (793). I refused to give the money to him when he came because I figured that he was not delivering the whisky. I went over to Margaret McNeil's and told

(Testimony of Oscar R. Lowenthal.)

her she had better get her money back, that I had it in my vault. She told me to bring it over there, but I did not do that. That night, about 11 or 12 o'clock, Mrs. McNeil told me that Newman and Malaby had been over there, and she had instructed me to give the money to Mr. Newman and Mr. Malaby. On that morning I telephoned her and she told me to give the money to Newman because she had found out the firm was all right and [247] she would rather have the firm have the money than some one she did not know. She told me to turn the money over to the International Import Company agents, Mr. Malaby and Mr. Newman (795). I turned the money over to Newman, in Malaby's presence. They paid me my commission, but Malaby told me I had made a mistake in my figures in the receipt I had given Mrs. McNeil for the money, and told me if I wanted my commission I had better go and get that money. I went back and showed her the mistake. It was written out on a piece of paper in Malaby's handwriting, and I copied it myself from his figures on some yellow sheets. I asked her to give me back my receipt, but she did not. I do not know what happened to the receipt. I never saw Malaby after that. Malaby figured out this deal. I noticed the price that he quoted. He put on the statement that he showed me, "Ceiling Price," so much money, and he told me that that is the way they were shipping the stuff out. We had quite an argument, and I told

(Testimony of Oscar R. Lowenthal.)

him that it was a hell of a note. That is the first time that I discovered that the whisky was being quoted at a different price than Malaby had given to me. I was through selling whisky before that, anyway, and I severed my connection. I had no more business dealings with him whatsoever. That was around the latter part of May. It was a few days after April 29, the date shown on Government's Exhibit 8-A, and I still had another deal in progress which I wanted to try to make. I called up Mrs. McNeil and asked her if everything was all right, and she said that it was and that she had just got 50 cases. I made out Defendant's Exhibit B for Identification in Mrs. McNeil's kitchen. She told me she had some rum and stuff that she wanted to sell, and asked me if I could sell it, and if I could that she would pay me a commission, and she gave me a list. She called out the figures for me to put down [248] and called off the articles, and I wrote them down on this piece of paper. This is the list. Mr. Bird, the OPA investigator, came to my house while I was in bed. I did not have any knowledge whatsoever of any alleged illegal object or conspiracy existing between Malaby and Newman or any other defendants in this case, and there was no fraudulent intent or motive on my part to engage in any illegal transaction as charged in the indictment; and I did not join in any agreement or conspiracy with Malaby or Newman or any other defendant about selling whisky over the OPA ceil-

(Testimony of Oscar R. Lowenthal.)

ing price. Nothing was ever said to me by Malaby or Newman or any other defendant in this case concerning the selling of whisky over the ceiling except in the McNeil case. At the time I was selling liquor I did not understand or believe that I was selling in excess of the price fixed, and I did not at any time conspire or agree with divers persons to commit offenses against the laws of the United States, particularly as to the sale of whisky in excess of the price fixed by the Office of Price Administration (803).

Cross Examination

By Mr. Licking:

The first time I knew anything about these transactions being over the ceiling price was when I talked to Malaby during the McNeil transaction. That was a few days before the execution of Government's Exhibit 8-A, which is dated April 29. It was really a few days after that date of April 29 (804). After I found out that the ceiling price was being violated, I still worked on a couple of deals that I had pending, so I would not lose on them. They did not go through, however; I quoted those deals long before that. The pieces of paper which you show me are a letter addressed by me to Nathan Newman at the Palace Hotel, and bears the stamp on the back, "Palace Hotel, Front Desk, May 25." It was addressed by [249] me and left at the Palace Hotel (805). It reads:

(Testimony of Oscar R. Lowenthal.)

“Palace Hotel Company, Front desk,
1944 May 25 P. M. 1:50

“1:50 P. M. The Palace Hotel, San Francisco
May 25, 1944.

“Hello Mr. Newman. I was here, tried to locate you in vain. I have gone after money and I don't mean maybe. ‘Can't rest,’ as Doctor advised, leaving you holding the sack, so if I don't get it you know where there. I am on my way to L. A. as it seems! No one will refund, as they should, without a lot of B. S.

“Don't forget to take care of that 300 cases Oakland deal. Mrs. Fernandes 7126 East Fourteenth Street. This means money I surely earned and I don't wish to lose all work for two months past. Tell Malaby Jimmie Gibson is pretty sore. Let's not lose that to for lack of merchandise.

“I'll see you as soon as I get back.

OSCAR.”

“P.S. Tell Malaby Hello. Oh, leave me three samples.”

(The document was marked U. S. Exhibit
34.) (806-807)

(Witness continuing:)

In spite of that letter I still contend that I had severed my connections with these transactions sometime in April.

(Testimony of Oscar R. Lowenthal.)

Redirect Examination

By Mr. McGuire:

After I quit my job I never had enough money to square up Mr. Newman on the McNeil money, so I went out to the Shows in which I had an interest, to collect the money, but did not get as much as I expected, and that was why I wrote the letter to Mr. Newman.

Cross Examination

By Mr. Licking:

I wanted three samples for the customers referred to in [250] there, to whom I had introduced Mr. Malaby and Mr. Newman. They wanted samples, and I never got them, so I asked Newman to get them and take them out there, because they were still interested in closing their deal (813).

Cross Examination

By Mr. Gillen:

My first conversation with Malaby regarding employment, he told me I was to make possible sales connections and then call him in as the general manager or as sales manager in the area to close the transactions, and that I was not to collect any money; and that is why I wrote the form of letter which I thought I should have by way of credentials. It is dated March 20, 1944, and is Defendants' Exhibit F. It was my understanding that Mr. Malaby was to collect all of the money and he was always on the spot to collect it (815). He introduced me to Shaeffer one time only, and I only

(Testimony of Oscar R. Lowenthal.)

made one deal in Shaeffer's office. Malaby charged me the commission. He took the first commission out of my commission. The only deal on which I went into the office on Kearny Street was the Thomason deal, and neither Shaffer nor Files was present. Malaby had told me that if I got any customers and he was not there, to take them into 309 Kearny Street, to deposit the money there. I had very few words with Shaeffer. He did not seem interested in me.

Further Cross Examination

By Mr. Licking:

I never did meet Mr. Cain until in this court room. I did not know he was in the Palace Hotel when I wrote the letter to Newman. When I was in Los Angeles I visited the office of the International Import Company to see if I could locate Malaby. I went in the office and asked for Cain or Newman or Malaby, and none of them were there. I never had any connection with the International Importing Company, as I see it now; but when I went in their office I figured I was listed with them, but I [251] never did meet Mr. Cain. My purpose in going to the office of the International Import Company was to get commissions (822). I went to Los Angeles after the whisky had been delivered, and after I had written this letter to Mr. Newman at the Palace Hotel on May 25. I asked the girl for Mr. Cain and for Mr. Malaby. I met Morrie Newman at one time, at the Palace Hotel in San Francisco (823). Malaby introduced me to

(Testimony of Oscar R. Lowenthal.)

Nathan Newman, about six weeks before I met Morrie Newman. Most of my discussions were with Malaby, but I did discuss the McNeil deal with Newman (825).

(Witness excused.)

CHARLES MALABY,

recalled for the Government in rebuttal; previously sworn.

Direct Examination

Mr. Licking: * * * it is stipulated that I may withdraw and substitute photostatic copies of two entries from the Palace Hotel showing that Nathan Newman and Burt Cain were registered there in Room 60224 on May 25. I offer these in evidence for that purpose.

Mr. Cannon: * * * I do object, to introduction in evidence at this time of any matters at all with respect to Mr. Newman in view of the fact it is not proper (826) rebuttal of any kind and in view of the further fact that Mr. Newman offered no matters in defense at all, but closed with the Government's conclusion.

Mr. Licking: If it is a conspiracy I doubt very much if any one counsel ever resting at any time could prevent the introduction of evidence.

Mr. Cannon: I think there should be no doubt about it. * * * (827)

Mr. Ames: If your Honor please, I have no ob-

(Testimony of Charles Malaby.)

jection to the statements contained in the particular registration card. [252] We are not denying the man's signature, not denying that he was there at that time. I am objecting, however, upon the ground it is not proper rebuttal of the direct testimony of Mr. Cain. He admitted he was there at or about that time.

The Court: That is my recollection. (828)

* * * *

Mr. Cannon: I take an exception. (828)

(The registration card was marked U. S. Exhibit 35 in evidence.) (829)

(Witness continuing:)

I recognize Government's Exhibit 32. Cain, Nate Newman, and I went to Mr. Cannon's office in Los Angeles because Cain wanted to ask Mr. Cannon's advice about dictating a letter, and Mr. Cannon told him he was not interested in any way, shape or form, but if he wanted to dictate a letter he would be glad to have it typed there. That is the letter that was dictated by Mr. Cain. I was furnished with a copy of it and Mr. Newman was furnished with a copy, and so was Cain. I do not know whether Mr. Cannon was in the office at the time the letters were delivered to us or not.

Cross Examination

By Mr. Ames:

I know that the letter was later revoked by Mr. Cain. Mr. Ehrlich was supposed to have it (830). I do not know that the original was never sent. It

(Testimony of Charles Malaby.)

is not true that at that time I was threatening Mr. Cain to lie about him in this case if he did not pay my attorney, Mr. Ehrlich. Mr. Cain and I have always been the best of friends, up to the moment that I pleaded guilty here.

Redirect Examination

By Mr. Licking:

Mr. Cain paid the premiums for my bail and the bail of Mr. Newman.

Mr. Cannon: If your Honor please, at this time I move [253] to strike out this Exhibit 35, and I make the motion on behalf of Mr. Newman on the ground it is incompetent, irrelevant and immaterial, and I also move at the same time to strike out all of the rebuttal testimony, so-called, elicited from Mr. Malaby. * * * (833)

Mr. Licking: The only matter that is offered against your client, Mr. Newman, is the fact your client was here at the Palace. The other was introduced merely upon the credibility of the witness, Cain.

Mr. Cannon: All right.

* * * *

Mr. Cannon: * * * I make the motion at this time, if the court please, to (834) strike from the record as far as Mr. Newman is concerned all those conversations and documents, all the testimony concerning which a similar motion was made at the conclusion of the prosecution's case in chief, and which your Honor denied. I make those motions without specifically stating them again, but refer-

(Testimony of Charles Malaby.)

ring to the ones made by Mr. Sheffy and the ones which I made at that time to strike certain evidence from the record. I make it jointly and severally for the defendants.

The Court: You want a record on it?

Mr. Cannon: Yes.

The Court: The motions will be denied.

Mr. Cannon: Exception taken jointly and severally.

At this time, if the Court please, I make at the conclusion of the entire case, I move the Court to dismiss the indictment as to each defendant and to acquit each defendant on the grounds heretofore stated, first, the indictment does not state any offense punishable by any laws of the United States or under the Constitution of the United States. I make the motion further [254] on the ground the indictment is so indefinite and so uncertain as to be insufficient to place the defendants or any of them on notice of what they are required to meet. And I also make the motion on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged. (835)

The Court: For the purpose of the record, I take it the Government had better answer that.

Mr. Licking: If your Honor please, I will answer it just this way: There is evidence before the Court which definitely implicates all of these defendants. Without the evidence of anyone else, the

(Testimony of Charles Malaby.)

evidence of the defendant Malaby definitely implicates every defendant in the case in complicity in this and in definite knowledge of it. There is positive evidence before the Court of at least three instances involving every defendant mentioned in the case. I will submit it. (836)

BURT CAIN

recalled on his own behalf, further testified:

Direct Examination

By Mr. Ames:

It is not true that I put up the bail money for Mr. Malaby and Mr. Newman in this case.

Cross Examination

By Mr. Licking:

Mr. Newman put up the bail money, but I have no idea where he got it. He did not get the money from me; and I do not know where he did get it (837). [255]

Mr. Gillen: May it please your Honor, on behalf of the defendant Shaeffer I desire to adopt and take advantage on the defendant Shaeffer's behalf of the technical motions that were presented to your Honor, that is, to adopt from the presentation at the close of the prosecution's case on the technical grounds advanced by both Mr. Sheffy and Mr. Cannon, and I believe Judge Ames; and in addition to that I at this time respectfully move your Honor

for the dismissal of the defendant Shaeffer upon the ground of a total lack of evidence in the prosecution's case, in the Government's case, to establish or connect Shaeffer with any conspiracy, if one existed. (838) * * *

The Court: —it is clearly the duty of the Court to deny your motion. (838)

Mr. Fillen: Very well, your Honor.

Mr. Cannon: I take exception on behalf of each defendant jointly and severally to the denial of the motion.

The Court: Let the record so show.

Mr. Cannon: At this time I make a motion to require the prosecution to elect on which of the overt acts that are specifically alleged in the indictment it will rely for a conviction in this case.

Mr. Licking: All of them. (838-839) * * *

Mr. Licking: I said all of them, counsel. (839) * * *

The Court: All of the overt acts alleged in the indictment.

Mr. Cannon: And that he feels he has introduced sufficient evidence on each and all of those overt acts. That is what he contends.

The Court: The other answer to that is that if it is sufficient under any one of these acts, it is sufficient for all purposes, if all of the defendants——

Mr. Cannon: Were in the conspiracy at the time the overt [256] act was proved to have been committed.

The Court: That is my state of mind.

Mr. Cannon: On this motion to require him to elect, I think you are right so far. When your Honor goes to render judgment, I may have a different view.

I take exception to your Honor's refusal to require the prosecution to elect.

During the course of this trial at one time counsel suggested that he was abandoning all of the overt acts except the last one alleged, and furthermore, there is the objection I have heretofore made from time to time as to the propriety of the introduction in evidence of certain documentary evidence as against all of the defendants and as to the propriety of the admission in evidence of certain conversations that have occurred between certain of the defendants out of the presence of other of the defendants after one of the alleged overt acts had been completed. That is the basis of the motion.

Mr. Licking: I submit it.

Mr. Cannon: I assume your Honor will not require him to elect on which particular one at this time. I take exception.

Mr. Licking: I have made the election. I stated to the Court that I am relying on all of the overt acts.

Mr. Ames: Your Honor, I have addressed you as to the guilt or innocence of my client——

The Court: Are you addressing yourself to the Court on the motion?

Mr. Ames: Did I understand that you deny the motion as to the defendant Cain as well?

The Court: As to all defendants I did not know that all the attorneys submitted the motion.

Mr. Ames: I submit it, your Honor.

The Court: Very well. [257]

Mr. McDonald: If your Honor please, I thought you were looking at me when you made that suggestion. Just for the purpose of the record, I want to join in the motions heretofore made by other counsel.

The Court: Very well.

Mr. McDonald: I except to your Honor's rulings. (839-840-841) * * * [258]

Thereupon on February 2, 1945 the Court found the defendants, and each of them, guilty of the charges laid in the indictment. Thereupon the defendant Nathan Newman filed the following Motion for Arrest of Judgment:

No. 29086-R

MOTION FOR ARREST OF JUDGMENT

Comes now the defendant Nathan Newman and moves the court to refrain from entering a judgment against him based upon the court's finding of guilt in this case upon the following grounds:

1. That the said indictment does not state facts sufficient to constitute a punishable offense or any

offense or crime against the laws or any law or against the Constitution of the United States, and particularly, said indictment does not state facts sufficient to constitute a violation of Title 18, United States Code, Section 88, a conspiracy to violate title 50 to the United States Code, Appendix Section 904a-925.

Dated: February 2nd, 1945.

DAVID H. CANNON

Attorney for Defendant Na-
than Newman [259]

I, David H. Cannon, do hereby certify that the above and foregoing motion is made in good faith and not for the purpose of delay, and in my opinion is well taken in law.

DAVID H. CANNON

Attorney for Defendant Na-
than Newman

POINTS AND AUTHORITIES IN SUPPORT OF THE FOREGOING MOTION

Reference is respectfully made to written Memorandum on Behalf of Nathan Newman, Defendant, heretofore and on January 23, 1945, served and filed with the above entitled court and particularly upon the following authorities therein cited:

United States v. Eisenminger, 16 Fed. (2d) 816,
817.

United States v. Kissel, et al., CCA N. Y., 173
Fed. 823.

United States v. Cruikshank, 292 U. S. 542, 558, 23 L. Ed. 588.

Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419, 422.

United States v. Carll, 101 U. S. 661; 26 L. Ed. 1135. [260]

In which Motion all of the defendants joined. Said Motions were then denied by the Trial Court and exceptions duly taken by each of the defendants.

The Court thereupon sentenced the defendants as follows:

Nathan Newman and Burt Cain, each, to imprisonment for a year and a day, and each to pay a fine in the sum of Ten Thousand Dollars (\$10,000.00); the defendants W. O. Files, R. H. Schaeffer and Oscar R. Lowenthal, each, to imprisonment for a period of nine months in the County jail, and each to pay a fine in the sum of Five Thousand Dollars (\$5,000.00). [261]

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS RE RECORD ON
APPEAL

Dated February 10, 1945

This case came on regularly this day for hearing the Court's instructions regarding the preparation of the record on appeal. William E. Licking, Esq., Assistant United States Attorney, was present on

behalf of the United States. Fred. McDonald, Esq., and S. E. Sheffey, Esq., were present as the attorneys for the defendants. On motion of Mr. McDonald, it is Ordered that the defendants have fifty (50) days within which to prepare and lodge their proposed bill of exceptions, that the United States is to have ten (10) days thereafter to file its proposed amendments. Further ordered that this case be continued until April 11, 1945, for settling the bill of exceptions. [262]

[Title of Circuit Court and Cause.]

ORDER EXTENDING TIME

Upon reading and filing the Affidavit of David H. Cannon, and good cause appearing,

It Is Ordered that the Appellants herein may have to and including April 15, 1945 within which to prepare, serve and lodge the proposed Bill of Exceptions herein, and within which to prepare, serve and file their Assignments of Error; that the Appellee, the United States of America, have ten days thereafter within which to file its proposed amendments to the Bill of Exceptions and that the time for the settling said Bill of Exceptions be and the same is hereby extended to May 1, 1945.

Dated: April 2, 1945.

.....

United States Circuit Judge

[Title of District Court and Cause.]

APPROVAL OF BILL OF EXCEPTIONS

This Bill of Exceptions having been duly presented to the Court, and having been amended to correspond to the facts, is now signed and made a part of the record in this case, and said Bill of Exceptions contains all of the evidence submitted to the trial court, except certain exhibits offered and received in evidence, but which said last mentioned exhibits are, under Stipulation of counsel, epitomized in said Bill of Exceptions, and the originals of which are transmitted to the Appellate Court; and said foregoing Bill of Exceptions is settled and allowed, all within the time fixed by proper Orders of Court.

Dated: April 28th, 1945.

MICHAEL J. ROCHE

Judge [264]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated the foregoing Bill of Exceptions is correct, and that the same may be settled and allowed by the Court.

FRANK J. HENNESSY

United States Attorney

WILLIAM E. LICKING

Assistant United States At-
torney

Attorneys for plaintiff and
appellee.

DAVID H. CANNON,
FRED McDONALD,
S. E. SHEFFEY,
By FRED McDONALD,
Attorneys for defendants and
appellants. [265]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 265 pages, numbered from 1 to 265, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of the United States of America vs. Nathan Newman, W. O. Files, R. H. Shaffer and Burt Cain No. 29086 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$17.15 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 10th day of July,
A. D. 1945.

[Seal]

C. W. CALBREATH

Clerk

By M. E. VAN BUREN

Deputy Clerk [266]

[Endorsed]: Filed May 31, 1945.

[Endorsed]: No. 10990. United States Circuit Court of Appeals for the Ninth Circuit. Nathan Newman, W. O. Files, R. H. Shaffer, and Burt Cain, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 18, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10990

BURT CAIN, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY ON
APPEAL AND DESIGNATION OF REC-
ORD NECESSARY FOR THE CONSID-
ERATION THEREOF.

To the Clerk of the Above Entitled Court:

In accordance with Sub-division 5 of Rule 19 of the above entitled court, you are hereby advised that the appellants herein adopt as their points on appeal, the Assignments of Error appearing in the transcript of the record, and said appellants hereby designate for printing the entire transcript of the record as certified to you.

Dated: May 31, 1945.

DAVID H. CANNON

Attorney for Appellants, Burt Cain, Nathan New-
man and W. O. Files.

[Endorsed]: Filed July 3, 1945. Paul P. O'Brien,
Clerk.

No. 10990.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATHAN NEWMAN, W. O. FILES and BURT CAIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT.

DAVID H. CANNON,
650 South Spring Street, Los Angeles 14, California,
*Attorney for Appellants Nathan Newman
and W. O. Files;*

DAVID H. CANNON,
650 South Spring Street, Los Angeles 14, California,
SIMEON SHEFFEY,
300 Montgomery Street, San Francisco, California,
Attorneys for Appellant Burt Cain.

FILED

TOPICAL INDEX.

	PAGE
Statement of the case.....	1
Statement of facts.....	3
Brief statement of the question involved.....	4
Point One. Insufficiency of the indictment.....	7
1. Defects touching the allegations as to the regulations and orders of the Price Administrator.....	11
2. Defects touching the failure to charge any conspiracy.....	15
3. Improper attempt to charge a felony based on allegations of acts which constitute a misdemeanor, if anything.....	20
4. Defects touching failure to charge conspiracy to violate any provisions of the Emergency Price Control Act.....	23
5. Insufficiency of details in the indictment to meet the re- quirements of a criminal charge.....	26
Point Two. The improper admission of evidence.....	32
Point Three. Error of the court in refusing to acquit the de- fendants upon their motions made at the close of the Govern- ment's case in chief, and also made at the close of the entire case. The entire evidence was insufficient to justify or to sustain the conviction of these defendants or of either of them	55
Conclusion	62

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Biskind v. United States, 281 Fed. 47.....	17
Corson v. United States, 147 Fed. (2d) 437.....	28
Heard v. United States, 255 Fed. 829.....	19
Heike v. United States, 227 U. S. 131, 57 L. Ed. 450.....	21
Johnson v. Biddle, 12 Fed. (2d) 366.....	17
Leady v. United States, 280 Fed. 864.....	19
Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429	19
Martin v. United States, 99 Fed. (2d) 236.....	17
Mitchell v. United States, 118 Fed. (2d) 653.....	19
Montana v. United States, 262 Fed. 283.....	30
Moore v. Hudaneth, 110 Fed. (2d) 386.....	17
Morris v. United States, 7 Fed. 785.....	25
People v. Rodriquez, 37 Cal. App. (2d) 290.....	52
Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419.....	24, 26, 27, 28
Stapp v. United States, 120 Fed. (2d) 898.....	19
Taylor v. United States, 2 Fed. (2d) 444.....	16
United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.....	27
United States v. Eisenminger, 16 Fed. (2d) 816.....	13, 21
United States v. Johnson, 26 App. D. C. 136.....	30
United States v. Kissel, et al., 173 Fed. 823.....	21
United States v. Motlow, 10 Fed. (2d) 657.....	23
United States v. Nixon, 235 U. S. 231.....	16

STATUTES.

United States Code, Title 18, Sec. 88.....	1, 20
United States Code, Title 50, Appendix, Sec. 902(a).....	12, 13, 14, 20
United States Code, Title 50, Appendix, Secs. 903-925.....	10, 12, 14, 16, 18, 25
United States Code, Title 50, Appendix, Sec. 925(a).....	23
United States Code, Title 50, Appendix, Sec. 925(b).....	18, 20, 23, 25

No. 10990.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATHAN NEWMAN, W. O. FILES and BURT CAIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT.

Statement of the Case.

The indictment in this case was filed in the Southern Division of the United States District Court for the Northern District of California, on December 20, 1944. It named as defendants Charles Malaby, Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal, Primo Rocco, and Burt Cain. They were charged with a violation of Section 88 of Title 18 U. S. C. "(Conspiracy to violate Title 50 U. S. Code, Appendix, Sections 904a-925)."

The case was tried before the court, sitting without a jury. The defendants Primo Rocco and Charles Malaby were used as witnesses by the prosecution [P. R. 179, 183], but they were not dismissed as defendants. The testimony

given by these two witnesses is of such nature that it cannot be doubted it contributed very largely to the conviction of the defendants.

Charles Malaby pleaded guilty and was later sentenced. The defendants Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal, and Burt Cain were adjudged guilty as charged in the indictment [P. R. 14]. Nathan Newman and Burt Cain were each sentenced to one year and one day and to pay a fine of \$10,000.00, and as to them the court recommended commitment to a United States penitentiary; the defendants W. O. Files, R. H. Shaffer and Oscar R. Lowenthal were each sentenced to imprisonment for a period of nine months and to pay a fine of \$5,000.00, and as to them the court recommended commitment to a jail type institution. The defendants Shaffer and Lowenthal did not appeal but entered upon the service of their sentences.

From the judgments pronounced as aforesaid, this appeal is prosecuted.

Notices of appeal on behalf of appellants W. O. Files [P. R. 27], Nathan Newman [P. R. 28], Burt Cain [P. R. 30] were filed on February 3, 1945. Joint Assignment of Errors were served and filed and a copy thereof appears on pages 51-54 of the Printed Record.

It is not proposed to urge the errors assigned *seriatim*, but they will be aggregated hereinafter for the purpose of discussions of points involved.

Statement of Facts.

The indictment is short [P. R. 2-4] and declares

“That Charles Malaby, Nathan Newman, W. O. Files, R. H. Shaffer, Oscar R. Lowenthal, Primo Rocco, Burt Cain (hereinafter called said defendants), at a time and place to said Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50 United States Code, Appendix, Sections 904a-925, by wilfully selling and delivering and by wilfully offering to sell and deliver, a certain commodity, to-wit, distilled spirits (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a), and that thereafter and during the existence of said conspiracy and to effect the object thereof, one or more of said defendants as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in furtherance of said conspiracy:”

Then, follows a series of alleged overt acts.

Brief Statement of the Questions Involved.

Briefly stated, the questions involved in this appeal, may be resolved into three points; *viz.*:

Point One: Insufficiency of the Indictment.

Point Two: The Improper Admission of Evidence.

Point Three: Error of the Court in Refusing to Acquit the Defendants upon Their Motions Made at the Close of the Government's Case in Chief, and Also Made at the Close of the Entire Case.

The evidence disclosed that Mr. Cain began the doing of business under the fictitious firm name and style of International Import Company. At the time of the trial he had been in the wholesale liquor business and in the business of importing liquors from Mexico for a year or a year and a half. His headquarters were in Los Angeles County, but he also operated in other parts of California. The evidence showed that Mr. Cain first met Malaby, Nathan Newman and Morris Newman (the latter was not indited or tried) about March, 1944 [P. R. 271]. Nathan Newman was appointed sales manager of the International Import Company and Malaby was appointed a salesman on commission.

Later, International Import Company secured a franchise [U. S. Exhibit 23, P. R. 259] for the sale of whiskey from the Mid-Valley Distributing Corporation, and ordered a car of whiskey from that company. This was purchased by Mr. Cain, doing business as International Import Company, as a wholesaler and distributor through

the regular channels of retail trade [P. R. 271]. On March 6, 1944, International Import Company secured from the Federal Government and from California a basic permit and a Wholesale and Importer's License [P. R. 271].

After Malaby had been employed as a salesman on commission and without any authority from or consultation with Mr. Cain, Malaby employed Lowenthal as a salesman. Prima Rocco came into the picture through the efforts of one Burnett, who had been employed by Malaby to solicit orders for the purchase of whiskey. Mr. Rocco made several calls upon various persons who bought whiskey, and at one time he testified that he collected certain money which he turned "over to Burnett and Malaby together" [P. R. 182]. Of the defendants, Rocco dealt only with and knew no one other than Malaby [P. R. 170].

At the time of the transactions complained of, Mr. Files was, and for a long time prior thereto had been, engaged in the real estate and insurance business in San Francisco, having an office on Kearney Street. He was asserted by the prosecution to have been in the conspiracy as the escrow holder of certain moneys deposited by purchasers of liquor, and the evidence of certain of the witnesses indicated that he did so act as escrow holder and in some instances gave receipts for money deposited in escrow for liquor. The defendant Shaffer had an office with Mr. Files and in one or two instances, hereafter discussed, was present when certain money was deposited in escrow with Mr. Files.

The evidence showed that some of the defendants, particularly Mr. Malaby, solicited orders for whiskey from many of the witnesses who were engaged in the liquor business, or in the conduct of cocktail bars and restaurants; that orders were taken from those persons by Mr. Malaby upon the forms of contract furnished to Malaby by International Import Company. These orders were taken at "over-the-ceiling prices," which excess price was paid in cash to Malaby, in most instances. The orders were written up for the whiskey on the basis of the ceiling price.

In every instance the person who paid, or contracted to pay, over-the-ceiling prices for the whiskey, knew that he was paying in excess of the prices fixed by the OPA, and in most of the instances those witnesses testified that they knew they were committing a crime in buying the whiskey at over-the-ceiling prices.

After many orders had been received, the carload of whiskey ordered by the International Import Company from the Mid-Valley Distributing Corporation arrived in California, and deliveries were made to the various purchasers of liquor. A short time thereafter the liquor was seized or condemned by the Food and Drug Department of the State of California as being below standard. Most of the liquor was picked up in the different bars, cafes and cocktail lounges where it has been distributed. The complaints made by the purchasers of liquor to Governmental agencies was the single moving cause in bringing about the indictment, but it was not contended during the trial, nor is it now contended that any of these defendants knew the liquor was substandard, or liable to seizure because of its poor quality.

POINT ONE.

Insufficiency of the Indictment.

Under this heading we proposed to discuss the Assignment of Errors I to VI, inclusive [P. R. 51-54] and XVI [P. R. 71] reading as follows:

"I.

Said District Court erred in denying their Demurrers to the indictment herein upon each and all of the grounds set out in said Demurrers, and requiring them to plead to the said indictment.

II.

Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Nathan Newman, W. O. Files and Burt Cain, of the charges made in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, to answer to the said indictment.

III.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss the said indictment, and to acquit them on each of the charges in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, and would not and does not tend to prove that the said Nathan Newman, W. O.

Files and Burt Cain are guilty in any manner or form as charged in said indictment.

IV.

Said District Court erred in entering judgment against and in pronouncing sentence upon the said defendants, Nathan Newman, W. O. Files and Burt Cain, in that the matters and things alleged in said indictment do not constitute an offense against the laws of the United States.

V.

The District Court erred in denying the motions made by the said defendants after the Court had found the defendants guilty in the above entitled cause, for an order arresting the judgment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or any law, or against the constitution of the United States, and particularly said indictment does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VI.

Said District Court erred in Overruling the objections of the said defendants to the admission of any evidence on this indictment, and admitting in evidence the testimony of the plaintiff's witnesses in support of the charges set out in said indictment. The grounds of the objections and the exceptions were as follows:

Mr. Licking: Q. Mr. Nathanson, you are an employee of the United States Government?

Mr. Cannon: I object to the introduction of any evidence on this indictment on the ground it does not

state an offense. I can state it very briefly to your Honor. I know the matter was raised by demurrer, but I prepared a rather lengthy brief on the expectation of this objection. I think I can point out very briefly why this indictment does not state an offense.

* * *

The Court: For the purpose of record, it will be denied.

Mr. Cannon: Exception. [14, 16]"

"XVI.

* * * * *

Mr. Cannon: Exception taken jointly and severally.

At this time, if the Court please, I make at the conclusion of the entire case, I move the Court to dismiss the indictment as to each defendant and to acquit each defendant on the grounds heretofore stated, first, the indictment does not state any offense punishable by any laws of the United States or under the Constitution of the United States. I make the motion further on the ground the indictment is so indefinite and so uncertain as to be insufficient to place the defendants or any of them on notice of what they are required to meet. And I also make the motion on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged.

* * * * *

The Court: —it is clearly the duty of the Court to deny your motion."

Obviously, if the indictment is legally insufficient, these convictions must be set aside. We urge that the indictment is wholly insufficient.

In this discussion it is important to keep in mind the statutes involved and for that reason we quote therefrom:

The indictment indicates at the outset that the proceeding involved:

“18 USCA. Section 88: (Conspiracy to violate Title 50 USCA Appendix, Sections 904a-925);” [P. R. 2].

“If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000.00 or imprisoned not more than two years, or both.”

“Sec. 904 (50 USCA Appendix)

(a) It shall be unlawful . . . for any person to sell or deliver any commodity . . . in violation of any regulation or order under section 2 [section 902 of this Appendix] . . . or of any regulation, order, or requirement under . . . section 205 (f) [sections 922(b) or 925(f) of this Appendix], or to offer, solicit, attempt, or agree to do any of the foregoing . . .”

Sections 903 through 925 (except for certain portions of Section 904 and certain portions of Section 925, both of which portions are hereafter considered) are not here discussed because they have nothing whatever to do with this particular prosecution.

To assist in clarifying the argument as to the insufficiency of the indictment, we have divided the argument into five sub-divisions, viz.:

1. Defects Touching the Allegations as to the Regulations and Orders of the Price Administrator.

2. Defects Touching the Failure to Charge Any Conspiracy.

3. Improper Attempt to Charge a Felony Based on Allegations of Acts Which Constitute a Misdemeanor, if Anything.

4. Defects Touching Failure to Charge Conspiracy to Violate Any Provisions of the Emergency Price Control Act.

5. Insufficiency of Details in the Indictment to Meet the Requirements of a Criminal Charge.

These points will be discussed in the foregoing order.

1. DEFECTS TOUCHING THE ALLEGATIONS AS TO THE REGULATIONS AND ORDERS OF THE PRICE ADMINISTRATOR.

This indictment charges that what the defendants did was "to sell and deliver, . . . (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902 (a)", etc.

The indictment specifically charges that the defendants conspired

" . . . to commit offenses against the laws of the United States, to-wit, offenses in violation of United States Code, Appendix, Sections 904 (a)—925, by

wilfully selling and delivering and by wilfully offering to sell and deliver a certain commodity, to-wit, distilled spirits (whiskey)” etc. (Emphasis Supplied.)

This indictment charges no conspiracy to violate any other sections than the specific Sections 904 (a) to 925. This is very important.

In other words, there is *no charge* that the defendants conspired to violate any of the provisions of Section 902 (a). This is likewise important.

Furthermore, although the indictment does say that defendants conspired to violate the law by wilfully selling and delivering and by wilfully offering to sell and deliver whiskey “at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations . . . duly made . . . under the provisions of 50 USCA, Section 902 (a)”, there is not one word in Section 902(a) which says anything whatever about the establishment of prices under which any commodity *might be sold and delivered or offered for sale or delivery*. This may be startling but it is true none the less. The pertinent parts of Section 902(a) are as follows:

“Section 902(a) Whenever in the judgment of the Price Administrator . . . prices of . . . commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act . . .”

Nothing is said about fixing a price or prices that cannot be exceeded in any sale or offering.

Conceding for the purposes of argument only—and that is the extent of the concession—that regulations and orders *could* have been and were promulgated under Section 902(a) by the Price Administrator fixing the maximum prices at which whiskey could be sold and delivered or offered for sale or delivery, still nothing is said in the indictment that any such *regulation* or *order* so promulgated by the Price Administrator was “accompanied by a statement of the consideration involved in the issuance of such regulation or order.” Yet, Section 902(a) specifically provides:

“*Every* regulation or order issued under the foregoing provisions of this subsection *shall* be accompanied by a statement of the considerations involved in the issuance of such regulation or order.” (Emphasis Supplied.)

Surely it would require no argument nor citation of authority to establish that the allegations that the defendants conspired “to commit offenses against the laws of the United States,” and that maximum prices had been “duly established by the Price Administrator” and that those prices were fixed by “regulations and orders duly made and promulgated” are mere conclusions of law and are not sufficient to raise an issue.

In *United States v. Eisenminger*, (Dist. Ct. Del.—1926) 16 Fed. (2d) 816, at 817 the court said that an

“. . . allegation (of conspiracy) ‘to violate the provisions of the Act of Congress known as the National Prohibition Act’ obviously does not set forth a conspiracy to commit an offense against the United States (citations), and serves no purpose in pleading that would not be equally served by an allegation of a conspiracy to violate the federal Criminal Code.”

In this indictment nothing more is added by the simple declaration that there was a violation of the regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a) by selling whiskey in excess of those prices so fixed. Particularly is this so when Section 902(a) of the Act says nothing whatever about maximum prices in connection with any sales or offer for sale of any commodity. In no event could any regulation or order, whatever it might be, promulgated under that Section, be of any binding effect at all unless it was “accompanied by a statement of the consideration involved in the issuing of such regulation or order.”

To epitomize these defects, we urge that—

A. There is no charge that the defendants conspired to violate Section 902(a); the indictment specifically alleges an intention to violate 904a—925.

B. There is nothing in Section 902(a) which says anything whatever about the establishment of prices at which any commodity might be sold or delivered or offered.

C. But even conceding that such regulations and orders could have been promulgated under Section 902(a) and even conceding that the prosecution intended to charge conspiracy to violate Section 902(a) (contrary to the direct allegation that the defendants conspired to violate Sections 904(a)—925) the allegations of the indictment are insufficient because the “regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a)” [Ind.; P. R. 2] are not alleged to have been “accompanied by a state-

ment of the considerations involved in the issuance of such regulation and order,” as required by Section 902(a).

This is the first point on the insufficiency of the indictment, but is by no means the strongest point.

2. DEFECTS TOUCHING THE FAILURE TO CHARGE ANY CONSPIRACY.

A short discussion and the citation of a few authorities out of an applicable multitude will demonstrate that this indictment does not contain a charge of any conspiracy legally sufficient as against a demurrer.

We again call attention to the fact that in this indictment no continuing conspiracy is charged. The indictment merely states that “at a time and place to said Grand Jurors unknown, (the defendants) did unlawfully, wilfully, knowingly, and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50 United States Code, Appendix, Sections 904a—925, by wilfully selling and delivering and by wilfully offering to sell and deliver, a certain commodity, . . . (whiskey) at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders duly made and promulgated under the provisions of 50 United States Code, Appendix, Section 902(a)” and thereafter performed certain overt acts in furtherance thereof.

The point involved here is: Does the indictment charge a *conspiracy* to commit a violation of 50 United States

Code, Appendix, or a *joint commission* of the substantive offenses denounced by 50 United States Code, Appendix?

We contend that the indictment *must* be construed as charging (except for the defects hereinafter pointed out), a *joint commission of the substantive offenses* rather than charging a *conspiracy* to violate the named sections of 50 United States Code, Appendix.

For the purpose of argument (only) we will concede that the wilful selling and delivering or the wilful offering to sell and deliver whiskey in violation of the regulations is a substantive offense. The prosecution must concede that “by wilfully selling and delivering and by wilfully offering to sell and deliver” that commodity in violation of the regulations, the defendants committed the *substantive* offense. *That is the charge made here.*

The inclusion in this indictment of the section numbers of the statutes, which it is claimed the defendants conspired to violate, “from no part of the indictment, and neither add to nor take from the legal effect of the charge.” (*U. S. v. Nixon*, 235 U. S. 231, 235.) Again this is borne out in *Taylor v. United States*, 2 Fed. (2d) 444, 446 (C.C.A. 7), in which it is said:

“The indictment is a pleading. Its sufficiency must be determined by the facts therein set forth. For the pleader to insert his conclusion that such facts are in violation of section 135 of the Criminal Code or of section 1014 of the Revised Statutes of the United States (Comp. St. Section 1674) neither adds to nor detracts from the allegations which alone must measure the sufficiency of such pleading.”

In *Biskind v. United States*, 281 Fed. 47 (C.C.A. 6), this language is used:

“The sole question presented relates to the legal sufficiency of the indictment and proofs. The indictment charges a conspiracy to commit ‘an offense against the United States; that is to say, to violate section 143 of the United States Criminal Code (section 10313) by rescuing and setting at liberty a person convicted of an offense and ordered committed, etc. We agree with the contention that section 143 does not apply to the facts set out in the indictment, because that section punishes only a forcible rescue, which the stated facts negative. In our opinion, however, the misreference to that section does not invalidate the indictment. It is well settled that a reference to the section relied upon by the pleader, contained in either the caption or the margin of an indictment, does not limit the prosecution to proof of a case under such statute. *Williams v. United States*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; *United States v. Nixon*, 235 U. S. 231, 235, 35 Sup. Ct. 49, 59 L. Ed. 207. In those cases it was said that the caption or margin constitutes no part of the indictment, and neither adds to nor weakens the legal force of its averments, while in the instant case the reference to the statute is in the body of the indictment; but in our opinion the case before us is within the reason of the rule announced in the *Williams* and *Nixon* Cases.”

See also *Johnson v. Biddle*, 12 Fed. (2d) 366-369, and numerous cases cited therein, and *Martin v. United States*, 99 Fed. (2d), 236, 238 (C.C.A. 10), and *Moore v. Hudaneth*, 110 Fed. (2d), 386, 388 (C.C.A. 10).

Eliminating from the body of this indictment these code references, the charge reads that the defendants conspired—

“ . . . to commit offenses against the laws of the United States, . . . by wilfully selling and delivering, and by wilfully offering to sell and deliver, a certain commodity, . . . (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders, . . . ”

It will be noted that the defendants are charged with a conspiracy to commit an offense against the laws of the United States merely “by wilfully selling and delivering,” etc., whiskey in violation of certain regulations; in other words, they are charged with a conspiracy by reason of the fact that they *did* wilfully sell and deliver that commodity in violation of the regulations. Such a charge is not enough. There must be a charge not only that the conspiracy was wilfully formed, *but that it was intended under the conspiracy to violate the law by wilfully selling or delivering or by wilfully offering to sell or deliver, the whiskey in violation of the regulations.* The doing of the act itself is not a conspiracy. The authorities for this proposition are clear.

You can have no conspiracy unless there is an intent to form a conspiracy; in other words, there must be a wilful participation in the conspiracy before any defendant could be held under such a charge. That is “Hornbook law.” There can be no violation of Section 904 unless *that* violation is wilful. We quote from Section 925 (b)—

“Any person who *wilfully* violates any provision of section 4 of this Act (section 904 of this Appendix)

* * * * *

shall, upon conviction thereof, be subject to a fine of not more than \$5,000.00 . . . or to imprisonment . . . for not more than one year . . . or to both such fine and imprisonment.”

It is a well established rule that the crime of *conspiracy* to commit a crime may be complete without the actual commission of the substantive offense to commit which the conspiracy was formed. The crime of conspiracy is committed when the unlawful federation and agreement occurs and one overt act in furtherance thereof is consummated. That overt act need not be in itself criminal at all, much less need it be the substantive offense itself. The commission of other overt acts does not enlarge the crime of criminal conspiracy.

Surely, it will be conceded that when the *object* of the conspiracy has been achieved, the conspiracy to achieve that object is at an end; that particular crime of conspiracy is finished.

Logan v. U. S., 144 U. S. 263; 12 S. Ct. 617; 36 L. Ed., 429;

Heard v. U. S., 255 Fed. 829 (C.C.A. 8);

Ledy v. U. S., 280 Fed. 864 (C.C.A. 8).

See also:

Mitchell v. U. S., 118 Fed. (2d) 653 (C.C.A. 10);

Stapp v. U. S., 120 Fed. (2d) 898 (C.C.A. 5).

In the instant case there is no charge—nor can this one be construed as charging—the conspiracy as embracing any intention to sell and deliver or to offer to sell and deliver, etc.; the charge is that the defendants formed the conspiracy *by* selling and delivering and *by* offering to

sell and deliver. There is no charge of any continuing conspiracy. When the selling and delivering or the offering to sell and deliver occurred, the substantive offense (a misdemeanor) was actually committed; *it could not be a conspiracy to commit, but a joint participation in the commission of the substantive offense.*

On the other hand, "by wilfully selling and delivering and by wilfully offering to sell and deliver," etc., the substantive offense was committed and the overt acts set out in the indictment became meaningless and of no further force as to any defendant.

No new conspiracy was formed and no new offense was committed.

3. IMPROPER ATTEMPT TO CHARGE A FELONY BASED ON ALLEGATIONS OF ACTS WHICH CONSTITUTE A MISDEMEANOR, IF ANYTHING.

One of the vices—although not by any means the only vice—of this kind of pleading is the obvious attempt on the part of the prosecuting officials to convert a misdemeanor into a felony, by the simple expedient of charging a conspiracy punishable by a fine of not more than \$10,000.00, or imprisonment of not more than two years, or both (18 U. S. C. Section 88), whereas the only crime committed here—if one was committed—was a misdemeanor through the violation of a regulation promulgated under Section 902(a), which violation under Section 925(b) is punishable by a fine of not more than \$5,000.00 or imprisonment of not more than one year, or both. This practice has been condemned in no uncertain terms.

We quote from *United States v. Kissel, et al*, (C.C.A., N. Y.) 173 Fed. 823, and which case has been favorably cited in *Heike v. United States*, 227 U. S. 131; 57 L. Ed. 450, 455—

“There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself. A large class of federal prosecutions . . . now habitually take the form of indictments for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. *Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded.* But there is no mysterious potency in the word ‘conspiracy’. *If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy.* The men who have committed the crime are liable to whatever penalties the law imposes and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime.” (Emphasis Supplied.)

The following forceful language is from the opinion in *United States v. Eisenminger*, 16 Fed. (2d) 816, 821—

“I think that the rules of pleading in conspiracy cases should not be further relaxed to the prejudice

of those accused, regardless of their guilt. It has in fact been long considered that there is in this country a tendency to extend the doctrine of conspiracy and utilize it for the indictment of persons suspected of crime of which there is difficulty of obtaining sufficient proof. Bouv. Dict. 'Conspiracy'."

In January of 1903, F. P. Blair, Esq., said in 37 Am. Law Rev. 33, under the title 'The Judge-Made Law of Conspiracy,' that 'it has become in recent years quite the fashion in this country, where two or more are suspected of some crime, for public prosecutors to have them indicted for conspiracy. The courts have made it delightfully easy to secure a conviction, by relaxing the rules of pleading and enlarging the scope of testimony. Thus a great mass of decisions has accumulated, each court apparently vying with all the others to make new law, until now almost any sort of an agreement may be styled a conspiracy; any indictment containing the magic words 'combined and conspired subtly and craftily' makes a good indictment, and any * * * evidence will prove the crime. * * *'

So widely has been the extension of the doctrine since those words were written that at the Judicial Conference held in 1925 under the Act of September 14, 1922 (42 Stat. 837), the Chief Justice of the United States and the Senior Circuit Judges made, in their Recommendations to the District Judges, this statement:

'We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony, and we express our conviction that, both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

‘Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet *the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for co-operative law breaking.* We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant’.” (Emphasis ours.)

These last quoted passages are used with strong approval, by Mr. Justice Butler, of the Supreme Court, sitting as a Circuit Justice, in *United States v. Motlow*, 10 Fed. (2d) 657, 662.

In our opinion, therefore, this indictment cannot be held to charge a conspiracy; its nearest approach to charging *any* crime is to charging a joint commission of a substantive offense under Section 925(a).

4. DEFECTS TOUCHING FAILURE TO CHARGE CONSPIRACY TO VIOLATE ANY PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT.

There is no charge that the defendants ever wilfully conspired to violate *wilfully* provisions of Section 925(b) of the Appendix. This is a crime created by statute and not a common law crime. There is *no* violation unless the

acts are *wilful* because the statute makes wilfulness a necessary ingredient of the offense.

“Indictments for offenses created and defined by statute must in all cases follow the words of the statute.” *United States v. Cruikshank*, 292 U. S. 542, 558, 23 L. Ed. 588.

“The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States v. Hess*, 124 U. S. 486, 31 L. Ed. 516. And in *Britton v. United States*, 108 U. S. 199, 27 L. Ed. 698, it was held, in an indictment for conspiracy under section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy.” *Pettibone v. United States*, 148 U. S. 197, 37 L. Ed. 419, 422.

To make this point clear, we suggest that if it had been charged that the defendants

“did unlawfully, wilfully, knowingly and feloniously conspire . . . to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50, United States Code, Appendix, Sections 904a-925, by intending to wilfully sell and deliver and by intending to wilfully offer to sell and deliver,”

whiskey at excessive prices, the charge of conspiracy would be sufficient except for the other defects pointed out in 5 *infra*.

Under Section 925(b), it is only a person “who *wilfully* violates any provisions of Section 904” that is guilty; in a mail fraud case it is only a person who uses the mails in furtherance of a scheme to defraud that is guilty. A person to be guilty of conspiracy to violate the mail from fraud statute must not only intend to form the scheme to defraud, but must intend to use the mails in connection with the perpetration of that fraud; so likewise a person to be guilty of a conspiracy to violate Section 925(b) must embrace in the conspiracy an intent to violate *wilfully* the provisions of Section 904.

In *Morris v. United States*, 7 Fed. 785 (C.C.A. 8), defendants were charged under Counts 1 to 18 with mail fraud violations and under Count 19 with a conspiracy to commit mail fraud.

The Court said:

“The government carries a heavier burden where it seeks a conviction under section 37 for a conspiracy to violate section 215 than where it merely seeks conviction for the violation of said section 215 because it must prove an intent on the part of the conspirator to use the mails in carrying out the scheme

“It was not essential to convict under any one of the eighteen counts that an intent to use the mails as a part of a scheme to defraud be shown. To warrant conviction under the nineteenth count, the intent to use the mails must be proved.”

5. INSUFFICIENCY OF DETAILS IN THE INDICTMENT TO MEET THE REQUIREMENTS OF A CRIMINAL CHARGE.

Probably the citation of one authority and quotations therefrom will settle this point. In *Pettibone v. United States*, 148 U. S. 197, 37 L. Ed. 419, the indictment sets out in considerable detail the fact that certain litigation was pending in United States District Court in Idaho and describes a series of acts done by the defendants and then alleges:

“‘And so the grand jurors aforesaid, upon their oaths aforesaid, do charge and say that the said’ defendants (naming them) . . . ‘did, on the 11th day of July, 1892, unlawfully, wilfully, fraudulently, and feloniously, conspire, combine, confederate, and agree together to commit an offense against the United States, to-wit, to corruptly and by force and threats obstruct and impede the due administration of justice in the aforesaid United States Circuit Court for the Ninth Judicial Circuit, District of Idaho.’”

Certain overt acts were alleged. Motions to quash and demurrers were filed and overruled and after verdict of guilty, motions in arrest of judgment were made and denied, and an appeal was taken to the Supreme Court of the United States.

The Supreme Court pointed out that there are two kinds of conspiracies which are punishable in the courts of the United States:

First, where by concerted action, the defendants sought to accomplish a criminal or unlawful purpose, and second, where the conspiracy had a purpose not in itself criminal or unlawful, but where the object was to accomplish it by criminal or unlawful means.

The Court then continues—

“ . . . when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment, while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

“This indictment does not in terms aver that it was the *purpose of the conspiracy* to violate the injunction referred to, or to impede or obstruct the due administration of justice in the circuit court; but it states, as a legal conclusion from the previous allegations, that the defendants *conspired* so to obstruct and impede . . . but the indictment nowhere made the direct charge *that the purpose of the conspiracy was to violate the injunction, or to interfere with proceedings in the circuit court.*” (Emphasis supplied.)

In this indictment not one word is said as to the “purpose of the conspiracy” that even approaches for clarity and definiteness the above quoted language taken from the *Pettibone* indictment. Yet, the Supreme Court in the *Pettibone* case said that the judgment should have been arrested and the indictment quashed, and in quoting from *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135, says:

“‘In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light

of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.’ ”

What these regulations and orders of the Price Administrator actually provide “cannot be supplied by intentment or implication”; the specific violation charged against these defendants

“must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.” (*Pettibone v. United States, supra.*)

This very type of pleading has been criticized by this very court in *Corson v. United States* (C. C. A. 9—1944) 147 Fed. (2d) 437. In that case it was charged that the defendant

“did knowingly, wilfully, and unlawfully assign and transfer . . . 800 . . . gasoline ration coupons in a manner other than in accordance with the provisions of Ration Order 5C”

He was convicted and appealed. The case was reversed on failure of the court to properly instruct the jury, but this court said at page 428—

“However, we pause to comment upon the poor draftsmanship of the formal accusatory document before us. Good pleading would unmistakably inform the accused as to the law he is alleged to have violated, and the information in this case does not come

up to this standard. After a careful study of the information, and, in fact, after a study of every page of the record and of the briefs, we have yet to learn what inhibition in the law the defendant is accused of having violated.”

In this case at bar, the defendants are charged with a conspiracy to commit offenses in violation of Title 50, United States Code, Appendix “. . . by wilfully selling and delivering and by wilfully offering to sell and deliver, a certain commodity, distilled spirits (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator,” etc. What those maximum prices were, it is not alleged; apparently Mr. Nathanson, a prosecution witness, who described himself “as a price specialist in the San Francisco District Office of the Price Administration, (and) as such familiar with the manner and method of arriving at the ceiling prices on various commodities such as whiskey” [P. R. 78], did not know. Mr. Nathanson said that “these prices for whiskey are governed under the provisions of the Maximum Price Regulation 445 as amended, and the price at the wholesaler’s level is fixed at the place of business of the wholesaler under the applicable regulation” [P. R. 78]. And further, that “the ceiling price on a particular brand of whiskey is not published in any bulletin issued by OPA, but is fixed by the application of certain rules to the manufacturer’s cost, and if anyone were to determine the ceiling price of this liquor that knowledge would have to come from the wholesaler’s record” [P. R. 79]. In desperation, the attorney for the prosecution asked this question:

“Q. Well, the OPA regulation, then, sets up a formula and the different costs and other factors are

applied and required to be complied with by the manufacturer, by the wholesaler, and by the retailer?"

and received the reply—

"Correct."

If an indictment does not allege what the maximum prices so "duly established" were, and if "a price specialist in the . . . Office of the Price Administration" does not know, and if those maximum prices can only be determined by a formula embracing factors "applied and required to be complied with by the manufacturer, by the wholesaler, and by the retailer," how can it be said that these defendants knew or had any means of knowing the charge levied against them?

"The indictment against an innocent defendant, being what every indictment is presumed to be, must, to be adequate, be in distinct and full terms, so plain as to preclude the necessity of guessing at the meaning. Men differ as to their capacity of comprehension, so that justly the law never punishes one for inability to comprehend a meaning not set down in exact words. 2 Bishop New Criminal Procedure, Paragraph 518." *Montana v. U. S.*, 262 Fed. 283, 288.

In a case arising in the District of Columbia (*U. S. v. Johnson*, 26 App. D. C. 136) where the question was raised by a motion in arrest of judgment as to the sufficiency of certain allegations of falsity, the court said:

"Counsel for appellant (Government) admits that it is only by implication that the indictment charges

that the recited answer was in fact false, and adds that 'although the charge is indirect and inferential' the effect is sufficiently clear as to be unmistakable to the ordinary intelligence. We think that it would be an unsafe rule to lay down that an indictment is good or bad according to the degree of intelligence of the indicted person or his attorney."

The defendants have at all times preserved for decision by this court the error committed by the trial court in ruling on the sufficiency of the indictment. Demurrer to the indictment was filed [P. R. 5] and overruled [P. R. 7]. Objection was made to the introduction of any evidence under the indictment on the ground that it does not state an offense [P. R. 77], and that objection was overruled [P. R. 78]; a motion was made at the close of the prosecution's case in chief to acquit all of the defendants on the ground, among others, that the indictment does not state facts sufficient to constitute a public offense, or any offense punishable by the laws or the constitution of the United States [P. R. 267] and the motion was denied; a similar motion was made at the close of the entire case [P. R. 311] and denied [P. R. 313]; and a motion was made to require the prosecution to elect on which of the overt acts set out in the indictment it would rely for a conviction in the case [P. R. 313] and the motion was denied [P. R. 314]; a motion for arrest of judgment was made [P. R. 11, 315] and denied [P. R. 317].

POINT TWO.

The Improper Admission of Evidence.

Under this heading we propose to discuss the Assignment of Errors VII to XV, inclusive [P. R. 54-71], reading as follows:

“VII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Steve Vincentini, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objections and the exceptions were as follows:

I had a discussion with him (Malaby) about whiskey.

Q. What did he say and what did you say?

Mr. Ames: I object to that. I will have to object, your Honor, on the ground it is incompetent, irrelevant and immaterial. * * *

Mr. Cannon: I just want to add a ground to the objection suggested by Judge Ames. The further objection is that it is hearsay as to all the defendants in this case. * * *

The Court: I will allow it subject to a motion to strike and over the objection of all the counsel.

Mr. Cannon: Exception. * * *

Mr. Cannon: I assume your Honor does not care to have us repeating objections. We understand the objection heretofore made to hearsay testimony applies also to any conversation which this witness may

have had with the defendants Files and *and* Shaef-fer, as far as my client is concerned.

The Court: All right.

Mr. Cannon: Exception to the ruling.

* * * * *

Q. At the time you had your conversation with Mr. Files and Mr. Schaeffer when Gabrielli was there, what was said, do you remember?

Mr. Ames: I make the objection the conversation would be hearsay as far as the defendant Cain is concerned, and not competent evidence to prove the crime alleged in the indictment.

Mr. Licking: This is a conversation which I will introduce, and I intend to connect it up to the satisfaction of the Court to show that it is a statement made by the conspirators during the course of the conspiracy, or to cover up the existence of a conspiracy.

The Court: Overruled.

Mr. Ames: Exception, your Honor, on behalf of the defendant Cain and all the defendants.

VIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, William S. Johnson, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was said by him? (Rocco.)

Mr. Cannon: I make a general objection on behalf of all the defendants to this conversation, and to whatever questions that may be gone into on the examination with respect to this conversation had out of the presence of any of the defendants, on the ground it is hearsay.

The Court: Overruled. I will allow it under the same ruling.

Mr. Cannon: Exception.

The Court: It is going in subject to your motion to strike and over your objection. Unless it is connected up—

Mr. Cannon: I may have the exception to the whole line of testimony, your Honor?

The Court: Yes.

IX.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Charles Ferrati, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purpose (purchase) of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. Do you recall what you said to Mr. Rocco and what he said to you? A. When Mr. Johnson was finished he called me over there—

Mr. Cannon: Your Honor, I offer an objection at this time on behalf of all the defendants to this conversation, and to questions that may be asked of this witness along the same line with respect to conversations on the ground it is hearsay and has no

value in the case as against any of these defendants. In anticipation of your Honor's ruling I will take an exception to it, and may I have an understanding the objection and exception runs to the entire line of testimony?

The Court: Yes. Objection overruled.

X.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Enrico Barrotti, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What did Rocco say when he introduced you to Burnett?

Mr. Cannon: If the Court please—

Mr. Licking: I will stipulate, if the Court please, that the same objection heretofore made by counsel is interposed to this and the Court has made the same ruling.

Mr. Cannon: It is hearsay as to these defendants and we will take an exception to the ruling, and the understanding is that we have a running objection and running exception to the testimony.

The Court: Let the record so show.

XI.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Frank Spenger, concerning certain conversations had with per-

sons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. About a week, you say, before you signed the first of the papers you after signed in the transaction; what was your conversation?

Mr. Cannon: If your Honor please, I object on behalf of all the defendants except Mr. Malaby. I make the objection jointly and severally, and anticipating your Honor's ruling I would like to take an exception to an adverse ruling. I object on the ground it is hearsay as to the other defendants. If it is agreeable with your Honor I would like to have the objection running throughout the conversation as between this witness and any other person out of the presence of any of these defendants. I take an exception to the ruling.

The Court: The objection will be overruled. I think I have indicated clearly, I attempted to, that unless it is connected up it will go out.

Mr. Cannon: I understand that. I am afraid, though, if we ever have to go to a circuit court that the circuit court may not understand the force of my objection.

The Court: I think under the new rules even an exception need not be taken.

XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Martin Fushslin, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the

negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The grounds of the objection and the exception were as follows:

Q. What was your conversation with Mr. McKinnon?

* * * * *

Mr. Cannon: It is hearsay as to these defendants; it does not prove or tend to prove any issue.

Mr. Licking: That is the same objection you have to all the similar testimony that has been introduced.

Mr. Cannon: Yes.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection?

The Court: Unless it is connected up it will go out.

(Witness continuing):

We were talking about the whiskey shortage and he said he knew where we could get some at about \$57 a case including everything.

Q. * * * Was there any discussion at that time about the ceiling price or OPA price? A. Well, I knew it was over the ceiling price.

Q. You knew it was over the ceiling price? A. Yes.

Mr. Cannon: I move to strike it out as immaterial.

Mr. Licking: If he knew it merely of his own knowledge,—if he knew if (it) from the conversation.

Mr. Cannon: I move it to be stricken out.

The Court: What is your objection?

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these purchasers, himself, became *pro tanto* a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whiskey became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser.

Mr. Cannon: I think I have made my objection clear to the court. I will take a ruling.

The Court: Objection overruled.

Mr. Cannon: Exception.

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence the testimony of the plaintiff's witness, Guy Caputa, concerning certain conversations had with persons outside the presence of certain defendants, and which conversation had to do with the negotiations for the purchase of whiskey over the ceiling price, and the collection of money for the amount paid for the whiskey above the ceiling price. The

grounds of the objections and the exceptions were as follows:

Q. What did he say and what did you say?

Mr. Cannon: At this time I object on the ground it is hearsay as far as all the other defendants are concerned, and I object to the testimony on that ground.

The Court: Overruled.

Mr. Cannon: Exception, and I reserve a motion to strike at a later period in the event it is not connected up.

The Court: Very well.

Mr. Cannon: Exception to your Honor's ruling.

* * * * *

Mr. Cannon: If your Honor please, at this time counsel and I have agreed upon the following stipulation, and that is, on all of the conversations that are being elicited from any witness which conversations are out of the presence of certain of the defendants, it will be deemed for the purpose of the record that those defendants were absent when the conversation was held, and I object to the testimony on the ground that it is hearsay and reserve a motion to strike it in the event at a later time it is not connected up.

Mr. Licking: I am perfectly willing if the Court is that that objection may be deemed taken to all conversations which I am eliciting.

The Court: Very well.

XIV.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and in admitting in evidence the following exhibits, identified by various witnesses, produced by

the prosecution. The said exhibits being as follows:

Government's exhibits 1; 2; 3-A; 3-B; 3-C; 4; 4-A; 4-B; 5; 6; 6-A; 7; 7-A; 7-B; 8; 8-A; 9; 9-A; 10; 10-A; 11; 12; 12-A; 12-B; 13; 13-A; 13-B; 13-C; 14; 14-A; 14-B; 14-C; 15; 16; 16-A; 17; 18; 18-A; 18-B; 19; 19-A; 20; 20-A; 20-B; 21; 22; 22-A; 23; 25; 25-A; 26; 26-A; 26-B; 26-C; 27; 28; 29; 30.

The grounds of the objections and the exceptions were as follows:

Mr. Cannon: It is hearsay as to all defendants. I make the objection jointly and severally on behalf of each defendant.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 1 for Identification was received in evidence.)

Mr. Licking: I now offer Government's Exhibit 2 for Identification against the defendants and all of them. * * *

Mr. Cannon: To which I object on the ground it is incompetent, irrelevant and immaterial, no proper or any foundation laid as to any defendant, and I object to it on behalf of each defendant separately on the ground it is hearsay.

The Court: Your objection will be overruled.

Mr. Cannon: Exception.

(U. S. Exhibit 2 for Identification was received in Evidence.)

Mr. Licking: May I have now Government's Exhibit 3 for Identification, the invoices covering the Vincentini transaction at Stockton? In connection with that, the Government's Exhibit 3-A for Identification, consisting of certified check debit, receipt

signed by Mr. Malaby referring to the Files escrow, and also a receipt signed by Mr. Files for \$2100 dated April 20, 1944 also as part of that a photostatic copy of a note signed by Mr. Files and Mr. Shaffer, defendant Files and defendant Shaffer, dated June 21, 1944, agreeing to pay \$3,668 to Steve Vincentini.

Mr. Cannon: I make the same objection on behalf of all defendants jointly and severally, and particularly to the promissory note of June 21, 1944 attached as part of that exhibit offered, it being a note signed by Mr. Files and Mr. Shaffer, on the ground it is hearsay as to anybody other than those two defendants.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Licking: I also offer 3-B under the same statement of facts as this.

Mr. Ames: If your Honor please, I particularly make a further objection on the part of the defendant Cain and also for the benefit of all the defendants and for and on their behalf. I object to the introduction in evidence of any of these vouchers or bills, whatever they may be called, invoices, for the additional reason that this particular one, Exhibit 3, and all like it, do not in any degree show any violation whatsoever of the statute upon which the prosecution lies. On the contrary these invoices show that these goods were sold at the ceiling price and nothing more. I make that general objection. I am going to make an objection to all of these documents for the reason that they do not prove any participation in any crime whatsoever.

The Court: The objection will be overruled.

Mr. Ames: Exception.

(U. S. Exhibits 3, 3-A and 3-B for Identification were received in evidence.)

Mr. Licking: I also offer Government's Exhibit 3-C under the same statement of facts.

Mr. Cannon: I make the same objection on the same grounds.

Mr. Ames: I make the same objection on the same grounds.

The Court: The objection is overruled.

Mr. Cannon: Exception.

Mr. Ames: Exception.

(U. S. Exhibit 3-C for Identification was received in evidence.)

Mr. Licking: I am perfectly willing to stipulate in the record, your Honor, that the same general objection heretofore offered by counsel to the exhibits I have offered be entered in the record.

Mr. Cannon: As far as my client is concerned, we object to the offer of each and all of these exhibits that counsel has offered or is about to offer, and we make the objection on behalf of each and every defendant, jointly and severally, on the following grounds: that they are incompetent, irrelevant and immaterial, because they have no bearing upon any issue in the case, and on the further ground that they are hearsay as to these defendants; on the further ground that they are or could have no probative value on the proving of any conspiracy, because they relate to past transactions, and after the completion of the crime which the indictment alleges was committed. In other words, many of these documents and transactions relate to occurrences subsequent to the date upon which the alleged conspiracy was complete, the crime of conspiracy was complete.

Mr. Licking: What date do you contend the conspiracy was complete?

Mr. Cannon: The date when the Court finds, if it does so find, that the first overt act alleged in the indictment was committed. I make that statement so there will be no question of the stand we take in the matter. Counsel yesterday sought to establish—

Mr. Licking: I didn't particularly seek to do it, counsel.

Mr. Cannon: If I may have that running objection on behalf of each and all of the defendants, it may be understood that the objection goes to the offer of each and all of them, and I will not interrupt any more.

The Court: Your objection will be overruled.

Mr. Cannon: May I have a stipulation?

Mr. Licking: Yes, I am perfectly willing to stipulate for the purpose of the record that that objection may be considered as a running objection to all of the exhibits I propose to introduce.

The Court: Very well.

Mr. Ames: And so far as the documents are concerned, they could tend to prove no crime as alleged in the indictment. I make that objection on behalf of the defendants.

The Court: The objection is overruled.

Mr. Ames: Exception.

XV.

Said District Court erred in denying the motion of the defendants to strike from the record certain testimony offered and received on behalf of the prosecution. The grounds of the motion and the exception to the ruling of the Court being as follows:

Mr. Sheffy: At this time, your Honor, I want to present a motion on behalf of all of the defendants, jointly and severally, to strike from the record certain testimony as to conversations that were admitted by the court subject to a motion to strike, those conversations being the conversations that were had with some of the defendants with third persons not in the presence of the other defendants.

I think I can make the motion general after stating, making reference to the testimony of one or two of the witnesses. For example, the witness Steve Vincentini, who testified he contacted Mr. Malaby in his apartment and talked about whiskey, that there was nobody present but himself and Mr. Malaby, and the court permitted the witness to state what conversation was had in Mr. Malaby's presence, subject to a motion to strike, and later he said as to the conversation with Malaby the motion would apply to all the defendants except the defendant Malaby. He testified that after talking with Mr. Malaby in this room that he then went to the office and talked to Mr. Files, Mr. Malaby and Mr. Shaeffer, and the court permitted, subject to a motion to strike, the conversation that was had at that place to be given, and in that instance the motion would be on behalf of the other defendants who were not present at that time.

The motion, therefore, is presented in each instance on behalf of those defendants who were not present at the time the conversations were had. I can go through my notes and take up each witness, witness by witness.

Mr. Licking: I am perfectly willing to stipulate that we haven't introduced testimony relating to any conversation at which all of the proposed defendants were present. There has apparently been no such conversation.

Mr. Sheffy: That is true, Mr. Licking, but in order to have the matter straight in the record, instead of taking each witness, witness by witness, I believe that I can make the general motion on behalf of the defendants who were not present at conversations testified to by one or more of the defendants (sig. witnesses), when the other defendants were not present, and as to all of that testimony I present to the court now a motion to strike that testimony. May it be stipulated, Mr. Licking, that my motion goes to the testimony of all of the witnesses?

Mr. Licking: If it is agreeable to the court, and the record may also indicate that that objection has been introduced as to each conversation as to which there has been testimony, and the objection has been entered and a motion to strike is now made on behalf of those defendants who were not present at that conversation on the ground that as to them, I presume, it is hearsay.

Mr. Sheffy: Hearsay; and on the further ground the statements of one of the alleged conspirators not in the presence of the others cannot be used to prove the conspiracy.

The Court: Is the matter submitted?

Mr. Sheffy: Yes, your Honor.

The Court: The motion will be denied.

Mr. Sheffy: Exception.

Mr. Cannon: If the Court please, may I just offer this further suggestion, that with respect to the motion which is made on behalf of all of the defendants that we call your Honor's attention particularly to all of the testimony that was introduced in evidence here bearing on any transaction or any conversation had, and also with respect to any documentary evidence introduced bearing upon a transaction subsequent to April 24, 1944, and make

the motion specifically in behalf of each defendant not definitely connected by his personal presence with any transaction occurring subsequent to April 24, 1944.

* * * * *

The Court: The motions, and each of them, will be denied.

Mr. Cannon: Exception in each case.

Mr. McDonald: May it please the Court, on behalf of the defendant W. O. Files I wish to adopt on his behalf and make part of this record each and every motion made by Mr. Sheffy and Mr. Cannon.

I further move to strike from the record all evidence, oral or documental, in reference to the transaction involving the witness Figone, on the ground the same is incompetent, irrelevant, and immaterial, and hearsay as to the defendant Files, as the conspiracy or no part thereof has been proven.

I also wish to make the motion on his behalf on the same grounds in reference to the witness McNeil; upon the same ground as to the witness Pete de Georgis; upon the same ground as to the witness Pete Reali; upon the same ground as to the witness Bryden; upon the same ground as to the witness Manuel Costa; upon the same ground as to the witnesses Lichtenberg and Johnson; upon the same ground as to the witness Barotti; upon the same ground as to the witness Caputa; upon the same ground as to the witness Kusalo; upon the same ground respecting a man by the name of Abrams, from Santa Rosa; upon the same ground as to any transaction involving John Di Silva; upon the same ground as to a certain money order sent to the witness Rocco; upon the same ground as to the letter from Malaby to the witness Burnett; and upon the

same ground as to any testimony in reference to a receipt from Malaby to a man named Sargiani.

Mr. Licking: Submitted.

The Court: Motions will be denied.

Mr. McDonald: Exceptions."

These Assignments of Errors are illustrative of the hearsay nature of the testimony offered and received, over objections, against these defendants. To have set out as separate Assignments of Errors similar testimony received from the lips of other prosecution witnesses would have prolonged to unreasonable proportions the Assignment of Errors and this brief.

Reading of the testimony given by the witnesses mentioned in Assignment of Errors VII to XIII, viz.:

Steven Vincentini [P. R. 86-92];

William S. Johnson [P. R. 97-98];

Charles Ferretti [P. R. 100-101];

Enrico Barrotti [P. R. 102-103];

Frank Spenger [P. R. 104-110];

Martin Fuchslin [P. R. 103, 110-116];

Guy Caputa [P. R. 118-121]

clearly shows that the testimony was very largely hearsay as to these appellants; was highly prejudicial to their rights, and, its admission in evidence could not be construed as being harmless error.

Vincentini testified that from some man then in France he obtained a card bearing Malaby's address and that this man told him to go there and he could buy whiskey from Malaby; that he saw Malaby at his apartment and discussed the price and the amount and had completed

the deal with Malaby when he left the apartment and deposited the \$2,100.00, at which time Malaby, Files and Shaffer were there; that he paid the money in cash and said "this is supposed to be for some whiskey deal. I want you to keep the money for this boy for 60 days"; that he gave the money to Files and he wrote out a receipt; that he had the order for the whiskey when he went to the office of Mr. Files, but he gave Mr. Files the money. That Malaby also gave him a receipt and that both receipts were given to him in Mr. Files' office [P. R. 92].

William S. Johnson testified that Rocco was the only one of the defendants that he had ever met, and that he negotiated with Rocco for the purchase of some whiskey, and Rocco told him he wanted a deposit down and the balance would have to be paid by a certified check, and that he would receive an invoice "covering the balance, but the first money I would have to give him in cash" [P. R. 98]. He did not know what the ceiling price of the whiskey was.

Charles Ferretti testified that he knew Primo Rocco and made arrangements with him to buy some whiskey at \$50.00 a case and that Rocco then told the witness that he would have to pay the balance when the liquor came, but would have to give him at that time \$500.00; that there was no discussion as to the OPA ceiling price; that later he met a man that he thought was Malaby who wanted him to sign a release on a whiskey warehouse receipt [P. R. 100-101].

Enrico Barrotti testified that he met Rocco who asked him if he wanted some whiskey and that Rocco was with a man named Burnett; that Rocco said he had had a carload come in and he would like to sell about 100 cases

more or less, and "I contracted for 200 cases and paid Rocco down \$4220.00, and he gave me a receipt for it, but later I refused to take the whiskey" [P. R. 102-103].

Frank Spenger testified that he first met Malaby through a Mr. Benson and that Benson remained outside of his place while Malaby and Spenger talked together; Malaby gave him a taste of whiskey which he proposed to sell him at \$60.00 a case for the blended and \$70.00 a case for the bonded; that he ordered 500 cases; that he gave a certified check for \$1809.50 to Malaby with whom he discussed how the over the ceiling price was to be paid and they decided to go to San Francisco and put it in escrow for 90 days until the whiskey was delivered; that they went to Mr. Files' office in San Francisco and Shaffer walked in there after the deal was over [P. R. 106] and "I drew my check" for the amount that he (the witness) and Malaby had figured out before they went to Files' office, and that "there was no discussion at all in Files' office as to the transaction that Malaby and I had made" [P. R. 106]; that he had already had his conversation with Malaby and the money was put up in Files' office as security to pay for the liquor, and very little was said to Files; that Files did not talk much about it; that later 50 cases of the blended whiskey was delivered and that he started to use it but had so many kicks on it that he stopped serving it, and later the Pure Food Department came along and condemned it all and he left it in the warehouse but later they came and took it away and sent it back to the National Import Company [P. R. 107]; that the check he made out and signed in Mr. Files' office was for \$13,736.00; that thereafter Malaby came to his place eight or nine times and the day the order was written up Mr. Newman was with him, but

there was no discussion about any overage. The only discussion that was ever had with Newman was concerning the ceiling price and not about any overage [P. R. 109]; that at the time he was in Mr. Files' office, he (the witness) brought up the subject himself and said, "What can I say this money is for, for my books?", and that he wanted to know if he could not put it down as a deposit on an apartment house or something [P. R. 109].

The witness Martin Fuchslin testified of his dealings with one John McKinnon, stating that about two weeks after he met him, he turned over some money in escrow, but at that time he had not signed any papers, but that Mr. Newman had torn up a receipt that he received. When Newman stood up he said that that was not the man and he identified Mr. Shaffer as being the man who tore up the receipt [P. R. 111]; that in his conversation with McKinnon they were talking about the whiskey shortage and he told the witness that some could be had at \$57.00 a case, which the witness knew was over the ceiling price, and that McKinnon had told him that he was to pay down so much, something about \$1,000.00 in escrow and the rest when the whiskey was obtained; that he met Mr. Files in a real estate office on Kearney Street and went there himself while McKinnon waited outside for him; that McKinnon had told him to ask for Mr. Files, who made out the receipt, which was given to him for \$1,200.00; that he did not meet anybody again until he paid the \$1,800.00 at which time he signed some documents; that the witness pointed out Mr. Files as being Mr. Malaby and then he identified Mr. Lowenthal as Mr. Malaby [P. R. 115-116].

The witness Guy Caputa testified that Malaby came alone to see him the first time and later he paid over

some money to Malaby, who had told him what the price would be for the whiskey; that no one was present when he first talked to Malaby; that after he had first given him some money Malaby came back again and raised it; that the witness then told Malaby he wanted his money back because he did not like the deal but he agreed to buy 500 cases and signed an order for it; that when he first talked to Malaby, Malaby told him he would have to pay the ceiling price of \$36.00 plus some more that he got the receipt for 500 cases of McHenry Reserve whiskey showing that the price was to be \$18,200.00 with a notation, "No cash down," and he got the receipt when he gave the money to Mr. Files on Kearney Street; that he went there alone; that Malaby had told him to go there and deposit the money, and that before that he had not seen Newman but saw him in the office of Mr. Files when he got the receipt on March 27th [P. R. 120]; that at that time there were no discussions, but that he just paid over the money because Malaby had said that Files was a nice man and he guaranteed to pay the money; that he paid over \$12,000.00 to Files, who did not say a word but gave him a receipt; that Malaby and Newman came to his place of business after that and at that time he told them he wanted his money back and they said that the next month they would give him \$5,000.00, which they did in two installments of \$2500.00 each, which money was paid back by Mr. Files [P. R. 121].

It seems to us it would serve no useful purpose to go over the testimony given by witness after witness who claimed to have purchased whiskey at over-the-ceiling prices. If the testimony of those witnesses is to be believed, it is clear that high-handed methods were used in some instances to get these witnesses to buy whiskey

in the "black market." However, the testimony given by these witnesses was in each instance to a very large degree hearsay as to all or as to most of the defendants, *unless* that testimony is construed as evidence of acts by a conspirator committed at the time of the existence and in furtherance of the conspiracy alleged. Many of the witnesses who purchased this liquor dealt only with Malaby or Rocco or Burnett, or with someone else, but in some instances their dealings and conversations were with more than one defendant. But even though the conversations had to do with the purchase of liquor, at over-the-ceiling prices, and even though those conversations may have been held with one person or with more than one person, those facts alone would not make those conversations admissible as against the other defendants.

The language used by the Court in *People v. Rodriguez*, 37 Cal. App. (2d) 290, is apt at this point. In the *Rodriguez* case the defendants were charged "with the crime of conspiracy to commit robbery."

"It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely

charging conspiracy. Relatively the same quantity and quality of evidence is necessary to support a judgment of conviction of the offense of conspiracy as of any other offense. Moreover, the same rules of evidence apply generally.”

In the face of the dilemma with which it was confronted and when objections were made time and again that the testimony offered and received was hearsay as to the defendants on trial, the prosecution was able to get the testimony of all of the liquor purchasers in evidence *by asserting that those purchasers themselves were conspirators.*

At one stage of the proceedings, the defendant Martin Fushslin was asked concerning *his* knowledge as to whether or not he was buying at over the ceiling price. Objection was made to that testimony and the following occurred:

“The Court: What is your objection?”

Mr. Cannon: It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court: He, as an individual, knew it.

Mr. Cannon: But his knowledge wouldn't be binding upon the defendants.

Mr. Licking: Well, I respectfully suggest, if your Honor please, that each one of these purchasers, himself, became *pro tanto* a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon: You mean each one of these purchasers of whiskey became a party to the conspiracy?

Mr. Licking: Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser" [P. R. 112].

On such a novel theory, any and every thing which anyone of these purchasers of whiskey might have said between themselves in the utter absence of all of the defendants, but relating to the purchase and sale of whiskey at over-the-ceiling prices would be admissible against these indicted defendants! The mere statement of the proposition demonstrates its untenability. If these purchasers were in fact conspirators, the indictment should have so alleged; the grand jurors must have known some of them because they actually named James Gibson, Elliott R. Smith, Martin Fushlin, Robert C. Thomas, and Frank Spenger, in the alleged overt acts; those men could not have been the conspirators described in the indictment as "divers other persons to said Grand Jurors unknown" [Rep. Tr. 2].

Proper motions to strike this hearsay evidence were made at the close of the government's case in chief [P. R. 262-267], and were denied by the trial court [P. R. 267]; those motions were renewed and again made at the close of the entire case [P. R. 310-311], and such motions to strike were denied by the trial court [P. R. 311].

POINT THREE.

Error of the Court in Refusing to Acquit the Defendants Upon Their Motions Made at the Close of the Government's Case in Chief, and Also Made at the Close of the Entire Case. The Entire Evidence Was Insufficient to Justify or to Sustain the Conviction of These Defendants or of Either of Them.

Under this heading we propose to discuss the Assignment of Errors II [P. R. 51], and part of XVI [P. R. 71] reading—

II.

“Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Nathan Newman, W. O. Files and Burt Cain, of the charges made in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is insufficient to hold them, the said Nathan Newman, W. O. Files and Burt Cain, to answer to the said indictment.” [P. R. 51-52.]

“XVI.

Mr. Cannon: * * * At this time, if the Court please, . . . I move the Court to dismiss the indictment as to each defendant and to acquit each defendant . . . on the ground that at the conclusion of the entire case there isn't any sufficient evidence upon which your Honor could find these defendants or any of them guilty of the offenses charged.

* * * * *

The Court: —it is clearly the duty of the Court to deny your motion.

Mr. Gillen: Very well, your Honor.

Mr. Cannon: I take exception on behalf of such defendant jointly and severally to the denial of the motion." [P. R. 71-72].

We realize that if the indictment is good as a pleading and if there is any substantial evidence, properly before the trial court, upon which the conviction of these defendants could be sustained, this court will not set aside those convictions. However, we respectfully urge that there is no substantial, properly admitted, evidence in this record to sustain the convictions of these defendants or of either of them.

It will be borne in mind that Mr. Newman rested his case at the conclusion of the Government's case in chief [P. R. 268].

It is stipulated and the trial court made the order that the "Bill of Exceptions contains all of the evidence submitted to the trial court, except certain exhibits offered and received in evidence, but which said last mentioned exhibits are, under stipulation of counsel, epitomized in said Bill of Exceptions, and the originals of which are transmitted to the Appellate Court" [P. R. 319].

About thirty-four witnesses were produced by the prosecution. Nearly all of them were buyers of whiskey through Malaby or through men whom Malaby had employed without the knowledge, consent or authorization of Mr. Cain. Only the witnesses Malaby, Cardinelli, Benson, Pitta and Goldstein even mentioned Cain; only the witnesses Malaby, Vincentini, Gabrielli, Spenger, Fuchslin, Caputa, Thomason, Nomellini, Benson, McKin-

non, Pitta, Goldstein and Williams even mentioned Files; and only the witnesses Malaby, Lichtenberg, Spenger, Fuchslin, Figone, Caputa, McNeil, Smith, Cardinelli, de Georgis, Bryden, Nomellini, Benson, de Silva, Costa, Burnett, Goldstein and Williams even mentioned Newman. Many of these witnesses did little more than mention the names of these respective defendants. We believe a fair statement of the testimony of each of these witnesses as they effect each of these appellants is as follows:

As to the witnesses who mentioned Mr. Cain:

Jack Cardinelli [P. R. 132-135].

The prosecution voluntarily limited this testimony and offered it "against the defendant Cain and the defendants Newman and Malaby" only [P. R. 134]. Cardinelli testified that he had previously met Malaby and then went to Malaby's room in the Palace Hotel where he met Newman and Cain. This was his first meeting with them. Newman was making out *invoices* on the typewriter and Cardinelli said he got an invoice that day [P. R. 133]. Newman was getting his information from Malaby to make out the invoices and Cain was lying on the bed, and Newman asked Malaby, "How about the overage?" and Malaby said, "Yes, I have got it" [P. R. 134]. Later the witness testified that he never did receive any invoice [P. R. 134], but he did get an order blank that was not signed by anybody and that Malaby had written it up; that he talked very little to Cain and said merely "How do you do" [P. R. 135].

Although Mr. Cain flatly denied any such conversation and denied being present at any such time as Cardinelli relates [P. R. 275] the testimony itself as given

by Mr. Cardinelli hardly seems credible. In the first place, Cardinelli said he had already given Malaby \$6,000.00 at the Sutter Hotel, and that while he went to the Palace Hotel to get the invoice, he never did get an invoice, and apparently out of the "clear sky" Newman asked Malaby if he had gotten the overage, all of the while no conversation going on between Cain and Cardinelli or with anyone else, and Cardinelli merely asking Cain "How do you do?"; there was no talk about any liquor [P. R. 135].

Malaby undertook to corroborate this testimony of Cardinelli [P. R. 204] but Malaby is a convicted felon [P. R. 184] and pleaded guilty to being a conspirator in the present case [P. R. 183]. According to the statement of the prosecuting attorney, Mr. Cardinelli is likewise a conspirator in the instant case [P. R. 112]. Such testimony ought not to be believed, even if it be said that the conversation was incriminating, a fact we do not concede.

The witness William H. Benson testified that he knew Mr. Cain. That is all of the testimony that he gave as to Mr. Cain [P. R. 147].

The witness Amaro Pitta testified that Shaffer and Malaby "were supposed to turn this money over to Cain when I got delivery of my 100 cases of whiskey" [P. R. 157]. There is absolutely nothing in the record to indicate the source of Mr. Pitta's evidence in that regard. There is nothing to show that Mr. Cain had anything whatever to do with this witness.

The witness Goldstein testified that he did not meet Mr. Cain personally until January, 1945, in Goldstein's attorney's office [P. R. 171]; that after he had gotten back his \$4,000.00 from Malaby [P. R. 172], which

was after June 5, 1944 [P. R. 170], he talked with Mr. Cain on the telephone and demanded from Cain "the money back on the whiskey that had been condemned; the ceiling price" [P. R. 172].

Certainly there is nothing in the testimony of Mr. Benson, Mr. Pitta or Mr. Goldstein which could in any way incriminate Mr. Cain.

As to the witnesses who mentioned Mr. Files:

We have already fully digested the testimony of the witnesses Steve Vincentini, Frank Spenger, Martin Fuchslin, Guy Cupata (pages 47 to 51, *supra*) touching all defendants including Mr. Files and Mr. Newman.

Of the other witnesses who mentioned Mr. Files, the record will bear out that Mr. Gabrielli testified he had never seen Mr. Files until 59 days after the deal had been made for the liquor, when he went to Mr. File's office to get the money which his friend Vincentini had deposited [P. R. 94]. Mr. Files actions, as testified to by Mr. Gabrielli were surely, not incriminatory.

Mr. Thomason said he went to Mr. Files' office and there met Malaby but that he did not know whether or nor Mr. Files was there [P. R. 122].

Mr. Nomellini testified he paid \$1800.00 to Mr. Malaby at Mr. Files' office, but did not remember with whom he talked, although Mr. Files and Mr. Newman were there where they could hear the conversation; that he got a receipt for the money but does not know who signed it [P. R. 145-6].

Mr. Bensen said he went to Files' office on several occasions in connection with the Spenger transactions; that after the deal had been made between Spenger and Malaby for the whiskey, he asked Files if he had cashed

Spengers' check. Files said he had turned the check over to Malaby; that he, Files and Spenger later talked trying to work out something for the protection of Spengers' money and that Files was willing to cooperate and do everything he could to protect Spengers' money [P. R. 148-9].

The witness McKinnon said Malaby introduced him and Lowenthal to Files and Shaffer, but nothing was discussed then and nothing was ever said in Mr. Files' office about ceiling price, but Malaby had previously told him and Lowenthal that the money for the whiskey was *supposed* to be deposited in Files' office; that he had told Fuchslin to go to Files' office but he did not see whether Files or Shaeffer gave Fuchslin a receipt or any money [P. R. 150-154].

Mr. Pitta testified that he paid some money to Shaef-fer in Mr. Files' office and got a receipt signed in Files name although Files was not there; Shaffer filled in the receipt and gave it to him when he gave Shaffer the money. Finally he got Shaffer and Files to give him a note for the money he had paid Shaffer [P. R. 156-8].

Gus Goldstein said he deposited \$4400.00 in Mr. Files' office and got Files' receipt for it but that there was no conversation in the presence of Shaffer and Files relative to the transaction, and that Files was instructed to hold the money until he released it at a later date, which the witness did [P. R. 168-9].

Lester G. Williams said that he made a whiskey deal with the two Newmans and Malaby and that later he went to Files' office to complete an escrow that they had talked of and that Files wrote out the terms "that the money would be returned to me in ninety days if the whiskey had not been delivered at that time"; that

on the ninetieth day he demanded his money back and got it within a few days, part through Malaby and the rest through Newman at Files' office [P. R. 175-6].

We respectfully submit that the evidence adduced from these witnesses is far short of enough to sustain a conviction of Mr. Files.

The testimony against Mr. Newman is more extensive than that against Mr. Cain or Mr. Files. A number of witnesses testified to having met Mr. Newman, either alone or in company with other defendants. However, many of the witnesses who identified Mr. Newman knew him only in connection with his collection of the regular invoice prices for the whiskey sold and in no instance was the invoice price or the price on the order form of International Import Company in excess of the ceiling price.

The testimony given by Mr. Malaby as to all of these defendants is obviously very damaging. It has all of the qualities which one might expect to find in the story of a twice confessed felon who seeks to gain immunity, or great clemency, by turning on those who by his own words were formerly his friends. In many respects, that testimony bears marks of high improbability but there is enough truth intermixed to make it difficult, if not impossible, to demonstrate the falsity of the most incriminating part of that evidence. While the Federal rule does not require corroboration of the testimony of an accomplice before a conviction may be had on that testimony, the Federal rule does require that such testimony shall be carefully scrutinized and accepted with great caution.

It is not unlikely that the large amounts of money involved in these sales and the commodity sold should react

unfavorably to these defendants. The fact that the prosecution witnesses were persons who freely and almost universally admitted that they, themselves, knew they were committing a crime in buying these goods, and that they sought the goods from any and every source might easily have reacted unfavorably towards these men, because they were in bad company.

Conclusion.

It is, therefore, respectfully submitted that these convictions, and each of them, should be set aside,

First, because the indictment is fatally defective in substance and in form;

Second, because the trial was based on the commission of one or more substantive offenses and not on a conspiracy to violate the law;

Third, because the prosecution has sought to change a misdemeanor into a felony by the simple expedient of pleading;

Fourth, because the improper admission of evidence resulted in an improper finding of guilt; and

Fifth, because without the improperly admitted evidence, there is not sufficient evidence in the record to support a verdict of guilt.

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No. 10,990

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATHAN NEWMAN, W. O. FILES and BURT
CAIN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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FILED

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Topical Index

	Page
Statement of case	1
Summary of evidence	2-7
I. The indictment is sufficient	8-14
(1) OPA Regulations sufficiently identified.....	8-9
(2) Conspiracy properly charged	9-10
(3) Felony properly charged	11
(4) Object of conspiracy properly charged.....	11-12
(5) Detail of indictment sufficient.....	12-14
II. Evidence properly admitted	14-17
III. Evidence sufficient to support conviction.....	17-18
Conclusion	18-19

Table of Authorities Cited

Cases	Pages
Clement v. U. S., 149 Fed. 305.....	12
Ford v. U. S., 10 F. (2d) 339.....	12
Marron v. U. S., 8 F. (2d) 251.....	15
Nickell v. U. S., 161 F. 702.....	12
Old Monastery Co. v. U. S., 147 F. (2d) 905.....	12
Pooler v. U. S., 127 Fed. 509.....	9
Smith v. U. S., 267 F. 665.....	14
U. S. v. Compagna, 146 F. (2d) 524.....	14
U. S. v. Fawcett, 115 F. (2d) 764.....	13
U. S. v. Von Clemm, 136 F. (2d) 968.....	18
U. S. v. Walburg, 47 F. Supp. 352.....	12
Wong Tai v. U. S., 273 U. S. 77.....	12

Statutes

Emergency Price Control Act of 1942 (50 U.S.C. App. 901-946), Sections 902(a), 904(a), 925(b).....	7-8
18 USCA 556	13
28 USCA 391	13

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STATEMENT OF CASE.

Appellants' statement of the case is correct.

STATEMENT OF FACTS.

Appellants' "statement of facts" is confined to a copy of the charging portion of the indictment; later (Br. 4-5-6) there is a short resume of evidence. The evidence for the purposes of this case is in the printed record, but for the convenience of the Court we shall summarize its (to our mind) salient features.

SUMMARY OF EVIDENCE.

Sometime early in January 1944 the defendants Charles Malaby and Nathan Newman while in Los Angeles discussed the matter of going into the whiskey business. Morris Newman (not a defendant in this case) said that he could go east and get some whiskey. After several discussions these three came to San Francisco to see if they could get a wholesaler to handle the whiskey they were going to bring in from the east.

On arrival in San Francisco, the defendant R. M. Schaffer (a former acquaintance of Malaby) was approached in this connection and was introduced to Nathan and Morris Newman by Charles Malaby. (P. R. 186-187.) Sometime later a sale of some 500 cases of whiskey was agreed upon by Charles Malaby, Morris and Nathan Newman to a Lester Williams. In connection with this transaction the matter of the deposit of the "overage"—(difference between the ceiling price and the agreed price) was discussed. Williams mentioned the necessity for an escrow holder and Malaby asked Schaffer to get someone to handle it. Schaffer mentioned the name of the defendant W. O. Files and said he would see if Files would handle it. Schaffer later reported that Files would handle it but that Files did not want to know about whiskey nor talk about it, and that those making deposits should not mention whiskey but should leave their money, get a receipt for it and walk out. (P. R. 188.)

The representation made to the depositors was that the money so deposited would be held for the period of escrow or until they had received their whiskey, or were satisfied that it would be delivered.

The agreement between the defendants was that the money so deposited (less Files' commission of 5%) would be immediately turned over to Nathan Newman to be used in financing their proposed operations. (P. R. 189.) Williams deposited \$10,255 with Files on February 3, 1944. (P. R. 175-176-237.) Shortly thereafter one Gus Goldstein deposited \$4,400.00 with Files in a similar transaction. (P. R. 168-170.) These sums less Files' commission of 5%) were immediately turned over by Files to Nathan Newman for the purpose of financing the proposed operation.

Up to this time the defendant Burt Cain was not yet in the picture, and Malaby was still trying to get a wholesaler and taking orders for whiskey. (P. R. 191.) Nathan Newman returned to Los Angeles and in a week or two told Malaby not to try longer to get a wholesaler—that they had one in Los Angeles. Malaby later went to Los Angeles and was introduced to Cain at the office of the International Import Co., the name under which Cain was licensed by the state and federal governments to do business as a wholesale liquor dealer. This federal license or basic permit was secured March 6, 1944. (P. R. 271.) He borrowed \$5000.00 from Nathan and Morris Newman to assist in starting the business. (P. R. 284.) Before the federal license was issued he was not a wholesale

liquor dealer but was a commission liquor salesman. (P. R. 280.)

Nathan Newman was made sales manager, Morris Newman purchasing agent, and Malaby a salesman on commission.

Malaby, the Newmans and Cain discussed the fact that Morris Newman had contacted the Midvalley Distillery in the east and they agreed to buy for \$2500.00 a franchise from the corporation to handle its liquor in California. (P. R. 193.)

Cain was familiar with the fact that "overage" had been collected from Williams and Goldstein. The matter of the general plan of operation and the collection of "overage" was discussed. It was agreed that Malaby should return to San Francisco and sell the Midvalley liquor or any liquor they could obtain and the overage collected was to be sent to Los Angeles and turned over to Cain. (P. R. 193.) Cain gave Malaby stationery and order blanks of the International Import Co., also credentials as a salesman. The price which he had been getting, \$55.00 to \$57.00 a case, was discussed with Cain by Malaby, also the possibility of getting \$60.00. (P. R. 193-194.)

Malaby returned to San Francisco to continue the same activity. He enlisted the services of the defendants Oscar Lowenthal and Primo Rocco, and of several others not named as defendants.

Morris Newman and Cain made satisfactory arrangements with the Midvalley for a franchise al-

though the "franchise" price (\$2500.00) was not accepted by that corporation but by a Mr. I. A. Needleman. (P. R. 285.) A car of McHenry blended whiskey was ordered and labels and samples furnished to the sales force. (P. R. 195.)

Malaby and his recruited sales force, with occasional help from Nathan Newman, managed to get additional orders for which over \$60,000 in overage was collected; some \$25,000 of this went through the Files "escrow" subject to his commission of 5%. The balance was collected for the most part by Malaby with Nathan Newman's occasional help. \$5344.00 overage was collected by defendant Oscar Lowenthal. (P. R. 125.) This money was all except for the commissions, expenses and salaries, sent or taken to Los Angeles to be turned over to Cain. (P. R. 193, 200.)

The plan in all cases, as appears from the testimony of the purchasers in each transaction and from the exhibits introduced in practically every instance, was to have the customer execute a purchase order which recited the ceiling price or an approximation, with the notation "no cash down". The "overage" (the difference between the amount of the ceiling price and the agreed price) was usually collected in cash with a receipt given showing another transaction. Upon delivery of the whiskey or whenever the customer was satisfied it would be delivered these receipts were surrendered.

Before the car of whiskey arrived but apparently after they had satisfactory proof that it was on the

road Malaby and Nathan Newman collected the ceiling price, delivered invoices, and in many cases secured and destroyed the receipts for "overage". (P. R. 170, 195, 196, 197).

When the whiskey arrived in May and deliveries were made it was unfit for use and was condemned by the state authorities. The various customers then began to demand their money back. One of them, Williams, whose money was used in part to finance the first operations, had already gotten his deposit back. (P. R. 237.) Goldstein apparently was refunded his "escrow" deposit. (P. R. 170-171.) Money for repayment of all customers was apparently not available. The customers were stalled with promises of other whiskey, some refunds were made; Files and Schaffer signed two notes, \$1000 was telegraphed to Rocco from Los Angeles; (P. R. 183) (Govt's Exh. No. 28); but the customers could not be kept quiet and the case broke. (P. R. 221.) What had happened to the money is not entirely clear; \$2600.00 to one Hornstein, a connection man for Midvalley Distillery (P. R. 218); \$14.00 a case "overage" to the distillery (P. R. 219), 5% "escrow" fees to Files; Malaby's and other salesmen's commissions, probably accounted for it.

While we cannot agree with appellants' statement (Br. 6) that "The complaints made by purchasers of liquor to governmental agencies was the single moving cause in bringing about the indictment," it is apparent that the conspiracy was brought into the open when the conspirators had no whiskey for their customers and no money to repay them.

The price at which the various transactions were arranged was from \$55.00 to \$60.00 per case. The ceiling ("maximum") price, on the whiskey the defendants were handling was then in this area \$37.63 per case. (P. R. 80.) Gov't Exh. No. 1. (P. R. 245-246.) Gov't Exh. No. 2.

We shall answer the points raised by appellant in order as presented.

I.

ANSWERING POINT ONE. (Apps'. Br., pp. 7-31.)

THE INDICTMENT IS SUFFICIENT.

Before discussing the different questions presented, a brief analysis of the pertinent provisions of the Emergency Price Control Act may clarify the issues and simplify the points to be discussed.

The Act (The Emergency Price Control Act of 1942", 50 U. S. C. A. 901-946) so far as is here material provides in brief that the Price Administrator may by regulation or order establish maximum prices;¹ that it shall be unlawful to sell or deliver any commodity in violation of such regulation or order,² and that it is a

¹Sec. 902 (a). "Whenever in the judgment of the Price Administrator (provided for in Section 201) (section 921 of this Appendix) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act (sections 901-946 of this Appendix) he may by regulation or order establish such maximum price, or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (sections 901-946 of this Appendix)."

²904 (a). "It shall be unlawful * * * for any person to sell or deliver any commodity * * * in violation of any regulation or order under Section 2 (section 902 of this Appendix) * * * or to offer * * * or agree to do any of the foregoing."

criminal offense to do so wilfully.³ Govt's Exh. No. 1 (P. R. 245-246), Govt's Exh. No. 2.

The indictment charges in plain language that the appellants were parties to a conspiracy which had for its object the commission of criminal offenses as defined by the Act.

ANSWERING 1. (Apps'. Br., pp. 11-14.)

As to 1, touching on alleged defects concerning the manner of alleging the regulations and orders of the Price Administrator.

The arguments advanced may be answered briefly as they are epitomized on page 14 of appellants' brief.

A. The indictment read in light of the whole statute shows that a charge of a conspiracy to violate Sec. 902 (a) alone, would not notify defendants of the criminal nature of the object of the conspiracy.

B. Again illustrates that the statute must be read as a whole. The object of the conspiracy is alleged to be "to commit offenses against the laws of the United States"; Sections 904 (a) and 925 (b) together define such criminal offenses.

C. Is in effect an argument that compliance with all administrative steps provided by statute for the issuance of administrative orders and regulations

³Sec. 925 (b). "Any person who wilfully violates any provision of section 4 of this Act (section 904 of this Appendix) * * * shall upon conviction thereof be subject to a fine of not more than \$5000 or to imprisonment * * * or not more than one year * * * or to both such fine and imprisonment."

must be specifically set out rather than as here generally. No authority is cited for this proposition; so far as we have been able to find there is none.

ANSWERING 2. (Apps'. Br., pp. 15-20.)

As to 2, "touching the failure to charge any conspiracy" we are unable to follow appellants' argument unless it is based on what we consider to be a strained construction of the language of the indictment. The statement is made (p. 18 Apps'. Br.) that they (defendants) are charged with a conspiracy by reason of the fact that "they did wilfully sell and deliver that commodity in violation of the regulation".⁴

The defendants are not charged with conspiring "by wilfully selling and delivering". In fact the manner and method of their conspiring whether by air, mail or rail is not set out. Nor do we know of any authority that requires where, as here, the purpose

⁴Exactly how appellants' counsel arrive at the construction that the words of the indictment "defendants * * * did conspire * * * to commit offenses against the laws of the United States * * * by wilfully selling * * *" mean that "defendants, by wilfully selling * * *, did conspire" is not stated. We assume it is because of a predisposition in favor of infinitive rather than participial phrasing as a method of designating acts intended to be done to accomplish a stated object. Here the infinitive phrase "to commit offenses" is properly used as a noun; the participial phrase "by wilfully selling * * *" in its adjectival function modifies this infinitive phrase rather than the remote noun "defendants".

The *Birkind* case (p. 17, Apps'. Brief) approves the participial method here used, without comment. The participial method of designation was specifically approved in "*Pooler v. U. S.*, 127 Fed. 509-518; the Court stating: "* * * this form of allegation is clearly sufficient in Federal Courts in misdemeanors, and is also in harmony with the common practice in all courts."

of the conspiracy is the commission of a crime or crimes that the manner, method or means used to conspire be set out.

We disagree with the grammatical construction placed by appellant upon the wording of the indictment. We submit that the words of the indictment beginning "by wilfully selling * * * 'and ending,' Section 902 (a)" relate to the expression immediately preceding them, "to commit offences against the laws of the United States", and that they designate the acts constituting the offenses alleged to be the object of the conspiracy.

We respectfully urge that no strained construction should be permitted to obscure the plain language of the indictment which charges the defendants with intentional criminal agreement to commit the offenses of wilfully selling and offering to sell whiskey in violation of the Administrator's regulation.

The conspiracy here charged had for its object not the commission of one offense but of an unknown number. The cases cited at page 19 of Appellants' Brief are as a consequence not in point. The evidence (p. 6, *supra*) shows that this conspiracy endured until terminated by circumstances beyond defendants' control.

ANSWERING 3. (Apps'. Br., pp. 20-23.)

As to 3, with the point urged that this is an attempt to turn acts constituting a misdemeanor into a felony; we take no exception to the decisions cited nor to the opinions expressed in the quotations from various cases, articles and reports. We are willing that the Court here consider this case in light of the language of those cases and opinions.

Here we contend was "a serious and substantially continued scheme for cooperative lawbreaking" (Apps.' Brief, p. 23.) The scheme was both alleged and proven.

ANSWERING 4. (Apps'. Br., pp. 23-26.)

As to 4, concerning the point that there is a failure to charge conspiracy to violate any provisions of the Emergency Price Control Act we can find no basis for appellants' argument unless it depends upon the same construction of the language of the indictment as was urged pages 15-20 Appellants' Brief and has been answered. (pp. 9-10, *supra*.) The offenses, the commission of which are here alleged to be the object of the conspiracy, are created by statute.

We repeat that we do not allege the manner, method or means by which the defendants conspired. We do designate as the object of the conspiracy the acts which defendants contemplated doing, and, recognizing the fact that unless those acts were wilfully done they would not constitute offenses we alleged, in the

language of the statute, that the object of the conspiracy was to *wilfully* do them.

The plain meaning of the indictment is that the defendants conspired to wilfully sell and deliver whiskey at prices over those established by lawful regulation and order.⁵

The *Morris* case (Apps'. Brief, p. 25) does not go to the point of pleading raised. As to the burden of proof it is perfectly correct, and we respectfully urge that we have proven as alleged that the purpose or object of the conspiracy was to "wilfully" do acts constituting offenses against the laws of the United States.

ANSWERING 5. (Apps'. Br., pp. 26-31.)

As to 5, the alleged insufficiency of details in the indictment to meet the requirements of a criminal charge, we have read the argument and the authorities cited in its support, and cannot (unless appellants' counsel still contend that the indictment does not allege that the purpose of the conspiracy was to wilfully sell and offer to sell whiskey at prices in excess of those prescribed by law) understand either.

⁵Technical accuracy must yield to the fair and obvious meaning of the language used when tested by the ordinary rules of construction.

Clement v. U. S., 149 F. 305, 313-315, 26 U. S. 562;

Nickell v. U. S., 161 F. 702-706;

Old Monastery Co. v. U. S., 147 F. (2d) 905-906.

Object of conspiracy need not be stated with the particularity required in indictment charging the substantive offenses.

Ford v. U. S., 10 F. (2d) 339, 343, 271 U. S. 652;

U. S. v. Walburg, 47 F. Supp. 352, 354;

Wong Tai v. U. S., 273 U. S. 77, 81.

If the contention here is that the description of the acts contemplated to be done is an allegation of means of conspiracy rather than a description of the offence contemplated, we have already answered it (pp. 9-10, *supra*); otherwise the authorities cited are not in point.

The charge here is one of conspiracy to commit offenses against the laws of the United States; those offenses are described in the terms of the statute which creates them. As we read the cases no further particularity is required.

We do not admit that the indictment is even technically defective. If it were considered to be so the case falls clearly within the provisions of 18 U. S. C. A. 556⁶ and 28 U. S. C. A. 391.⁷

The language of the opinion in *U. S. v. Fawcett*, 115 F. (2d) 764 at 766 seems appropriate. The Court said referring to the above statutes:

“These statutes, we think, evidence the intention of Congress to eliminate the effect of all

⁶“Sec. 556. Defects of form. No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect, or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (R. S. Sec. 1025.)”

⁷“Sec. 391. (Judicial Code, section 269, amended.) New trial, harmless error. All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. Sec. 726; Mar. 3, 1911, c. 231, Sec. 269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181.)”

purely technical and formal defects which in no wise prejudice a defendant, or affect his substantial rights, on the theory that, in the progress of the law, narrow formalism should be eliminated and only the attainment of substantial justice sought.”

ANSWERING POINT TWO. (Apps'. Br., pp. 32-54.)

ALLEGED IMPROPER ADMISSION OF EVIDENCE.

This portion of appellants' brief is devoted to the familiar problem involved in all extended cases (conspiracy or substantive) involving joint defendants. It is impossible to prove all of the case by any one witness.

The exceptions all relate to the admission in evidence of conversations and transactions had out of the presence of certain of the defendants which were admitted on the offer to the prosecution to connect, and subject to defendants' motion to strike.

We contend that all the evidence so received was properly connected with all the defendants before the close of the trial.

There was the same objection to correlated exhibits which were identified by the various witnesses as connected with these conversations and transactions. This documentary evidence had been marked for identification, and was offered and received in evidence at the close of the prosecution's case.⁸

⁸These objections really go to the order of proof which is within the discretion of the trial Court.

Smith v. U. S., 267 F. 665, 668 (3);

U. S. v. Compagna, 146 F. (2d) 524, 530 (13-15).

As to whether such oral and documentary evidence was connected by proper evidence with all the defendants we submit the fair test is not to consider the evidence of each witness, and the face of each document alone, but in view of the entire evidence in the case.⁹

Counsel for appellants has selected (Apps'. Brief, p. 47) only seven assignments of error as basis for his argument in this connection.

We shall discuss in detail only the first of these assignments; that relative to the reception in evidence and the trial court's denial of the motion to strike the testimony of Steven Vincentini; Vincentini's testimony alone brings defendants Files and Schaffer into the picture; with the testimony of Vincenzo Gabrielli (P. R. 93 and 95) it also brings in the names of defendants Cain and Newman; with the exhibits, Govt. III, IIIa, IIIb, IIIc, it appears that the transaction fits the conspiracy pattern; a payment of "overage"; an order reciting the ceiling price with no mention of any prepayment; an "escrow" receipt which makes no mention of any liquor transaction, and finally the note executed by defendants Schaffer and Files, after the phone call to defendant Cain in Los Angeles; not merely for the amount Files had taken in "escrow", but for that amount plus what had been paid for whiskey delivered by the International Importing Co. (Cain) at the ceiling price.

⁹Question is to be decided in light of evidence at conclusion of trial.

Marron v. U. S., 8 F. (2d) 251-257 (9).

It is also significant that in connection with the discussion as to whether the money would be repaid Files told Gabrielli that if he didn't believe it he could talk to Williams (P. R. 96). Williams was one of the first "escrow" depositors of "overage" (\$10,255.00 on February 3, 1944) and had been fully repaid at the time referred to in Gabrielli's testimony. (P. R. 175-176-239.)

Further definite connection of Vincentini's testimony, if considered necessary, appears in the testimony of the witness Malaby generally in that he in effect testified that each of the appellants was a member of the conspiracy; specifically as to the transaction. (P. R. 197).

The testimony of William S. Johnson considered in connection with that of his partner Rudolph Lichtenburg (P. R. 99), Charles Ferretti (P. R. 199), Primo Rocco (P. R. 179-183), Ira Burnett (P. R. 164-167) and Charles Malaby (P. R. 198-199) shows the same clear connection of the challenged evidence to the appealing defendants. The testimony of Charles Ferretti and of Enrico Barotti relates to a transaction also handled by Rocco, Burnett and Malaby.

The testimony of Frank Spenger, with Govt's Exhibits 4, 4a and 4b; the testimony of W. H. Benson (P. R. 147-149, 242-245) Govt's Exhibit 31 and the testimony of Charles Malaby (P. R. 208-210) is not only sufficiently connected to have been properly received but might well be alone relied upon to sustain the conviction of each of the appealing defendants.

The testimony of Martin Fuchslin read in connection with that of John McKinnon (P. R. 149-152) with the whole testimony of Charles Malaby, particularly (P. R. 207) is certainly sufficiently tied into the general picture to be properly admissible.

Cuy Caputa's testimony alone with government's Exhibits 6 and 6a is admissible as to appellants Files and Newman; and with Malaby's general testimony particularly (P. R. 198) definitely fits the general picture so perfectly that its admission as to all defendants was clearly proper.

This brief discussion of the instances relied upon by appellants' counsel as error, we respectfully submit clearly shows that the evidence complained of was properly admitted as declarations and acts of conspirators, committed in furtherance of the conspiracy and during its existence.

ANSWERING POINT THREE. (Apps'. Brief, pp. 55-62.)
ALLEGED INSUFFICIENCY OF EVIDENCE.

The third point advanced is best disposed of by the language of appellants' brief at page 56:

“We realize that if the indictment is good as a pleading and if there is any substantial evidence properly before the trial court, upon which the conviction of these defendants could be sustained, this court will not set aside their convictions.”

No citation of authority is required to establish that this statement is made in realization of the law as to

the function of this court in reviewing the trial Court's finding of fact.

We do not consider it necessary to discuss the argument advanced by counsel in connection with the matter of the alleged insufficiency of the evidence. We have previously discussed in detail the evidence of certain witnesses in connection with alleged improper admission of evidence (pp. 14-17, *supra*), and have summarized the entire evidence (pp. 2-7, *supra*).

Appellants' comments on the testimony of Charles Malaby (Apps'. Brief, p. 61) is practically an admission that the point urged is of little merit. The language of the opinion in *U. S. v. Von Clemm*, 136 F. (2d) 968-970 seems appropriate. We quote:

"In the light of the evidence above summarized it seems little short of effrontery for the appellants to argue that the jury's verdict is not supportable. Rarely have we seen a case where an illegal conspiracy was so clearly inferable from proven facts or where the accused were so completely enmeshed in a web of their own making."

CONCLUSION.

The indictment in the case is sufficient both in substance and form. It fully apprises the defendants of the charge against them and is sufficient to afford the basis of a plea of former jeopardy. It contains sufficient substance (factual allegations) to enable the trial court to state as it did that the facts alleged were sufficient to support a conviction on the charge made.

There was no improper admission of evidence which can be said to have resulted in appellants' conviction.

A conspiracy was charged and proved to exist. The evidence demonstrates beyond any doubt that there was here a concerted plan of criminal action having for its purpose the wilful sale of whiskey at prices in excess of those established by law.

It is respectfully submitted that these convictions should be affirmed.

Dated, San Francisco, California,
February 18, 1946.

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Assistant United States Attorney,
Attorneys for Appellee.

No. 10,990

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATHAN NEWMAN, W. O. FILES, R. H.
SHAFFER, and BURT CAIN,
vs.

Appellants,

UNITED STATES OF AMERICA,

Appellee.

PETITION OF BURT CAIN FOR A REHEARING
After Decision Affirming Judgment of the Trial Court
and
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PETITION FOR A REHEARING

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FILED

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PAUL P. O'BRIEN,
CLERK

Topical Index

	Page
I.	
The evidence in this matter conclusively shows that Burt Cain was not a member of the conspiracy charged in the indictment	2
(a) The indictment charges the formation of only one conspiracy and that prior to March 10, 1944	2
(b) The evidence without any question shows that Cain never met nor did he know of the existence of the other accused until after the date fixed in the indictment as subsequent to the consummation of the conspiracy, and hence could not have been a member thereof	4
II.	
If the charge is that the conspiracy was formed by others of the accused and that Cain thereafter became a member thereof, the indictment should so allege. Cain was not informed of any charge against him except as contained in the indictment and could not prepare his defense except as charged	14
III.	
When the jurisdiction of the Court to try a conspiracy charge depends upon the allegations of the place where the overt acts were committed, facts showing the relevancy or manner in which the overt acts furthered or tended to further the object of the conspiracy must be alleged in the indictment. Mere conclusions of the pleader will not suffice	18
IV.	
Since Cain was not shown to have been a member of the conspiracy, as laid in the indictment, the admission into evidence of statements made not in his presence was error and such statements were hearsay	30
Summary	31

Table of Authorities Cited

	Pages
Asgill v. United States, 60 Fed. (2d) 780, 785	7
Bain, ex parte (121 U.S. 1), 30 L. Ed. 849	29
Boykin v. U. S., 11 Fed. (2d) 484, 485	21
Bradford v. United States, 152 Fed. 616, 619	5
Bratton v. United States, 73 Fed. (2d) 795, 798	26
Brightman v. United States, 7 Fed. (2d) 532, 534	28
Dahly v. United States, 50 Fed. (2d) 37, 42	9
Fisher v. U. S., 2 Fed. (2d) 843, 845	6
Frankfort Distilleries v. U. S., 114 Fed. (2d) 824, 832	12
Fuller v. U. S., 114 Fed. (2d) 698, 699	23
Hammer v. U. S., 134 Fed. (2d) 592, 595	7
Jay v. U. S., 35 Fed. (2d) 553	6
Norton v. U. S., 295 Fed. 136, 137	7
People v. Wakao, 33 Cal. App. 454, 456	25
Smith v. U. S., 157 Fed. 721, 725	16
Terry v. U. S., 7 Fed. (2d) 28, 29	3, 7
Tillinghast v. Richards, 225 Fed. 226, 231	19
Tillinghast v. Richards, 225 Fed. 230	20
Tingle v. U. S., 38 Fed. (2d) 573, 575	30
United States v. Hirsch (100 U.S. 33), 25 L. Ed. 539, 540..	7
U. S. v. Atlantic Journal Co., 185 Fed. 656, 662	16
U. S. v. Ault, 263 Fed. 800	24
U. S. v. Biggs, 157 Fed. 264, 272	10, 12
U. S. v. Dowling, 278 Fed. 630, 639	18
U. S. v. Great Western Sugar Co., 39 Fed. (2d) 152, 154...	29
U. S. v. Green, 136 Fed. 618, 656	15
U. S. v. Grossman, 55 Fed. (2d) 408, 411.....	17
U. S. v. Miller, 36 Fed. 890, 892	8
U. S. v. Norris (281 U.S. 619), 74 L. Ed. 1075	29
U. S. v. Richards, 149 Fed. 443, 452	8
U. S. v. Safeway Stores, 51 Fed. Supp. 448	23
Wilson v. U. S., 109 Fed. (2d) 895	6

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PETITION OF BURT CAIN FOR A REHEARING

**After Decision Affirming Judgment of the Trial Court
and**

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PETITION FOR A REHEARING**

*To the Honorable Clifton Mathews, William Healy
and Homer T. Bone, Judges of the Ninth Circuit
Court of Appeals:*

Appellant Burt Cain, in the above entitled matter, respectfully presents his petition for a rehearing of his appeal in said matter, and for ground of his petition specifies as follows:

I.

THE EVIDENCE IN THIS MATTER CONCLUSIVELY SHOWS THAT BURT CAIN WAS NOT A MEMBER OF THE CONSPIRACY CHARGED IN THE INDICTMENT.

- (a) The indictment charges the formation of only one conspiracy and that prior to March 10, 1944.

The indictment in the case at bar charges that the accused,

“* * * at a time and place to said Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, * * * and that *thereafter* and during the existence of said conspiracy and to effect the object thereof, one or more of said defendants as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in furtherance of said conspiracy:” (P. R. 2-3.) (Emphasis added.)

The first overt act in point of time as alleged in the indictment, reads:

“1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearny Street, San Francisco, California;” (P. R. 3.)

Since the indictment alleges that the overt acts occurred after the accused, by the indictment, are alleged to have conspired and agreed, it must be taken as true that the conspiracy charged was entered into prior to the commission of the first overt act in point

of time, to-wit: March 10, 1944. Hence the indictment in effect alleges that the accused conspired and agreed on or before March 10, 1944 and *thereafter* did the overt acts.

We realize that a person may become a part of a conspiracy after it has been formed, but if such is the contention, the indictment should so charge, or the overt acts alleged should so demonstrate. The indictment here involved, after alleging in effect the consummation of the plan or scheme prior to March 10, 1944, then alleges the commission of nine overt acts, in none of which was appellant Cain a participant. Since the evidence shows conclusively that Cain did not know, or had not met any of the other accused, until after March 10, 1944, he could not have been a party to the formation of the original conspiracy charged. Unless, therefore, Cain is accused by the indictment of becoming a member of the conspiracy subsequent to its formation or with the doing of some overt act alleged bringing him into the conspiracy, there is no charge against him except that he conspired and agreed prior to March 10, 1944. He is and was at the trial totally uninformed by the indictment of any other charge which he was to meet.

In *Terry v. U. S.*, 7 Fed. (2d) 28, 29, the court says:

Ordinarily a charge of conspiracy is not circumscribed or limited by averments as to the time when or the place where the conspiracy was formed. *The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however divers its objects, and no defendant could be*

convicted thereunder unless he was shown to be a member of or party to that conspiracy. Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it. (Emphasis added.)

In the case at bar, only one conspiracy is charged by the indictment. That conspiracy as to its formation is limited as to time by the allegations of the indictment of the first overt act to some time prior to March 10, 1944. This is the only conspiracy or agreement charged.

- (b) The evidence without any question shows that Cain never met nor did he know of the existence of the other accused until after the date fixed in the indictment as subsequent to the consummation of the conspiracy charged, and hence could not have been a member thereof.

The only evidence showing any association of appellant Cain with any of the parties at any time is that of the witnesses Malaby, Cardinelli, and of Cain himself.

Fixing the time of his first meeting with Cain, Malaby testified:

“The day that I met Cain we did not talk very much, but the next day I came back and we talked about the transaction, and I told Cain that I wished he would give two letters of credentials, to show people that I was representing International Import Company; and he gave me those letters, and they are marked Government’s Exhibits 22 and 22-A for Identification, and are

dated March 22, the date I received them.” (P. R. 192.)

Cardinelli fixed the time of his meeting Cain as follows:

“Some time in May I came to San Francisco and went to the Palace Hotel where Malaby was. I talked very little to Cain. I said, ‘How do you do’ when I was introduced.” (P. R. 135.)

Cain, himself a witness, testified:

“I first met the Newsmans, Nathan and Morrie, about the middle of March, 1944; and Malaby about March 21, 1944.” (P. R. 271.)

This is the only evidence fixing the time Cain met any of the other accused and is undisputed. There was no showing that Cain ever met any of the other accused.

In a conspiracy indictment it is not necessary that the exact date of the formation of the conspiracy be alleged. However it is necessary that the time of the formation be alleged to be prior to the doing of the overt acts. This rule the indictment in the case at bar recognizes by fixing the dates of the overt acts and by alleging that they were done after the formation of the conspiracy.

Bradford v. United States, 152 Fed. 616, 619.

“This is not a case where the date of the formation or the beginning of the conspiracy must be plead with exact accuracy. It need not be proven that the conspiracy was formed and begun at the date given in the indictment. *The es-*

essential point is that the conspiracy existed before the date of the overt act alleged, and continued to exist at the time the overt act was committed.”
(Emphasis added.)

What must be proven must be alleged, hence the allegation, in the indictment at bar, that the conspiracy was formed before the overt acts were done, fixes the time. That the overt acts may be referred to for fixing time, see *Fisher v. United States*, 2 Fed. (2d) 843, 845.

It is no answer to this contention to say that a conspiracy as to time need not be proved exactly as charged in the indictment or that a conspiracy is sufficiently proved if it is shown to have been in existence prior to the time of the commission of any overt act alleged and proved. The supposed answer is subject to the rule that a variance between pleading and proof becomes material when the rights of the accused are prejudiced thereby. In the case at bar let us suppose that the conspiracy part of the offense was not concluded until just prior to the time the last overt act was done. Then all the evidence admitted relating to the doing of any one or all of the previous overt acts alleged, was erroneously admitted and the rights of the accused, especially Cain, were prejudiced thereby. That evidence of overt acts done prior to the formation of a conspiracy is inadmissible, see

Jay v. United States, 35 Fed. (2d) 553;

Wilson v. United States, 109 Fed. (2d) 895.

A person cannot be convicted on *the* overt act who has not joined in the previous conspiracy.

United States v. Hirsch (100 U. S. 33), 25 L. Ed. 539, 540.

If Cain is to be convicted of conspiring and agreeing to do an unlawful act, the fact and manner of his agreeing must be distinctly and directly alleged.

Hammer v. United States, 134 Fed. (2d) 592, 595.

Evidence of an unalleged agreement is incompetent. *Asgill v. United States*, 60 Fed. (2d) 780, 785. Having disproved the conspiracy charged in the indictment, nothing remained therein upon which Cain could be legally convicted. The proper method of charging a subsequent adherence to a conspiracy already formed, is indicated in *Norton v. United States*, 295 Fed. 136, 137.

As said by the Court in *Terry v. United States*, *supra*, p. 30:

“* * * a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime.”

Without an allegation in the indictment that Appellant Cain became a member of the conspiracy subsequent to the time of its formation and without some allegation as to how he did so or without a recital therein of an overt act which fixed Cain as a participant in said conspiracy, the indictment at most merely charged that Cain conspired with the other defendants, on or before March 10, 1944. The evidence re-

futes this charge. However, it was the only charge which the indictment informed Cain that he was to meet at the trial and against which he was called upon to defend himself.

Since the gist of a conspiracy is the conspiracy itself, the overt acts alleged must post-date the formation of the plan or scheme, or, if the conspiracy is a continuing one, it must be alleged or shown in the indictment when and how the particular accused became subsequently a member of the conspiracy.

As to the relation in time of the charge of conspiracy and the doing of overt acts, the Court said, in *United States v. Miller*, 36 Fed. 890, 892:

“In neither count is there any averment of time or place of the alleged ‘overt’ act, which would seem to be necessary to identify the act, and to show the court and jury that the same post-dated the conspiracy, and was in fact an act, not a part of the conspiracy but done to effect its object.”

To the same effect is *United States v. Richards*, 149 Fed. 443, 452, where the Court, in charging the jury, said:

“I have before stated that the overt act must be one independent of the conspiracy or agreement. This is true. Yet the overt act, the manner and the circumstances under which it is done, may be considered, in connection with other evidence in the case, as one circumstance in determining whether or not there was the conspiracy or agreement charged. *But it must be established*

that the conspiracy or agreement which is charged to have existed, and which is the gist of the action in this case, had been formed before and was existing at the time of committing the overt act." (Emphasis added.)

Dahly v. United States, 50 Fed. (2d) 37, 42:

"A conspiracy under Section 37 Cr. Code (18 USCA §§88) is an agreement by two or more persons to commit an offense against the United States. The gist of the offense is the conspiracy; that is, the agreement between two or more persons to effect the unlawful end; but before the offense is a completed one, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy. Such act is called an overt act.

"Two things, therefore, must be proved before a conviction can properly be had: (1) The conspiracy or agreement to commit the offense named against the United States; (2) an overt act or acts done in furtherance of the conspiracy. The overt act or acts need not be criminal per se; but an overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiracy together, *but it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy.*

"The overt act or acts, the manner and circumstances under which they are done, may be considered in connection with other evidence in the case as circumstances in determining whether or

not there was formed the conspiracy or agreement charged; *but it must be established that the conspiracy or agreement which is charged to have existed and which is the gist of the offense had been formed before and was existing at the time of the commission of the overt act or acts.*" (Emphasis added.)

As applied to Appellant Cain in the case at bar, all the overt acts are alleged to have occurred after the conspiracy agreement was entered into. Thus, on March 10, 1944, the conspiracy had been accomplished and thereafter nothing remained to be done but the effecting its purpose. Cain disproved his part in any such agreement. There is no other, further or subsequent agreeing or conspiring charged. The overt acts, even if they could assist in this regard, are totally silent as to any agreeing or conspiring on Cain's part. Hence, having affirmatively disproved that he was a party to any agreement or conspiracy made before March 10, 1944, and no other conspiring or agreeing being charged in the indictment, Cain was entitled to a dismissal of the charge against him.

We believe the Court laid down rules particularly apropos to the case at bar in the case of *United States v. Biggs*, 157 Fed. 264, 272:

"But it is insisted that the closing part of the indictment, found after the overt acts are set out, shows clearly that but one conspiracy is charged, and that that was a continuing conspiracy from August 25, 1899, to the date of the presenting of the indictment. And this leads us to another objection raised.

“Assuming that the indictment does not charge several conspiracies, as above indicated, but that it was one conspiracy continuous from its formation on August 25, 1899, to the presenting of the indictment, we come to consider the plea of the statute of limitations. The first overt act in furtherance of the conspiracy is charged as of date August 25, 1899, and *it is insisted by the defendants that, if the indictment charges but the one conspiracy, on the commission of that overt act prosecution could have then been had, and that therefore the statute of limitations began to run as of that date. Against this it is answered that under the doctrine in the Ware Case, supra, every overt act, with ‘conscious participation’ by the defendants in the unlawful combination, works a renewal of the conspiracy. This may be conceded to be the clear holding in that case; but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence and the particular proof then in hand, which is a very different thing from the rules applicable to pleading, in charging a criminal offense. In that case the indictment charged the formation of a conspiracy within the statute, and, if the proof in such a case sustains the charge, it would be no defense for the defendant to show that a like conspiracy had been theretofore formed and overt acts done thereunder prior to the bar. Taking, therefore, the closing part of the indictment as a part of the charge, it appears that the conspiracy charged against the defendants and all of the overt acts charged thereunder, save the last one, were at a time far more than three years before the filing of the indictment.*” (Emphasis added.)

In the case at bar the offense charged was completed with the performance of the first overt act alleged. There is no allegation in the indictment of any further agreeing or conspiring after this date. The overt acts do not show this. There is only the weakest form of allegation from which the inference may be drawn that the conspiracy continued beyond the date of the first overt act in this; the indictment alleges: "and that thereafter and during the existence of said conspiracy," etc. (P. R. 2) the overt acts were done on various dates. But repeating again the language of the *Biggs* case, *supra* (273):

"Against this it is answered that under the doctrine in the *Ware* Case, *supra*, every overt act, 'conscious-participation' by the defendants in the unlawful combination, works a renewal of the conspiracy. This may be conceded to be the clear holding in that case; but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence and the particular proof then in hand, which is a very different thing from the rules applicable to pleading, in charging a criminal offense."

We repeat the foregoing language to emphasize that *it is a matter of pleading we are dealing with here, and not a matter of evidence*. There is no charge whatsoever in the indictment that Cain conspired or agreed, except that he conspired and agreed prior to March 10, 1944, and this he totally disproved.

In *Frankfort Distilleries v. United States*, 144 Fed. (2d) 824, 832, the Court said:

“The several counts each charge only a single crime—the conspiracy. The conspiracy as laid includes several acts and means of making it effective, but the crime is the entering into the combination. That is the unit, however varied the means and procedure of effectuating it. The several acts and means of making the conspiracy effective are related acts which enter into the crime, but still the single crime is that of combining and conspiring together to restrain interstate trade and commerce, or to monopolize such trade and commerce. Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23; *United States v. New York Great Atlantic & Pacific Tea Co.*, *supra*.”

The selling and delivering and the offering to sell and deliver by which the accused in the indictment are alleged to have conspired and agreed, are in like manner alleged to have occurred prior to March 10, 1944, and hence Appellant Cain could not have been a party thereto. Therefore, since the indictment charges only one conspiracy, continuing or not, and the date of the formation thereof being fixed as prior to the date of the doing of the first overt act and the evidence without question showing that Cain did not know and had never heard of any of the other accused until subsequent to the doing of the first overt act, the evidence proves that he could not have been a party to the conspiracy charged.

II.

IF THE CHARGE IS THAT THE CONSPIRACY WAS FORMED BY OTHERS OF THE ACCUSED AND THAT CAIN THEREAFTER BECAME A MEMBER THEREOF, THE INDICTMENT SHOULD SO ALLEGE. CAIN WAS NOT INFORMED OF ANY CHARGE AGAINST HIM EXCEPT AS CONTAINED IN THE INDICTMENT AND COULD NOT PREPARE HIS DEFENSE EXCEPT AS CHARGED.

Cain at the trial was prepared to meet, did meet and disprove that he was a member of, or entered into any agreement of, conspiracy prior to March 10, 1944, as laid in the indictment. He was not charged with participating in or with having any knowledge of the overt acts alleged, and the evidence did not prove any such connection. At the trial of the matter it was contended by the prosecution that Cain, after the conspiracy had been formed and subsequent to March 10, 1944, had adhered to and by agreement and acts, had become a member of, the conspiracy. This the indictment does not charge and without such charge Cain was not informed of the charge he was to meet. Under these circumstances, Cain, knowing full well that he could disprove his entry into any conspiracy as laid in the indictment, waived his right to trial by jury. Furthermore, a judgment of conviction or acquittal of a conspiracy formed prior to March 10, 1944, could not be pleaded in bar of a charge of conspiracy formed subsequent to such date. We, of course, know the rule that one may join a conspiracy after it is formed, and in so doing his act of joining relates back to the inception of the conspiracy, but this is a matter of evidence. *What we are dealing with*

here is a matter of pleading. In order for the evidence to be admissible, it must be appropriate to the pleading. The pleading limits the scope of the evidence admissible and not vice versa. To make evidence admissible that Cain became a member of the conspiracy after it was formed, the indictment must so allege. Without such allegation, Cain was entirely uninformed of the charge he was called upon at the trial to meet. When Cain met and disproved that he had conspired prior to March 10, 1944, he had met and disproved every charge against him contained in the indictment. In *United States v. Green*, 136 Fed. 618, 656, the Court said:

“In a criminal indictment charging a conspiracy to defraud the United States, the defendants are entitled to be informed in the indictment of the acts they are charged with having agreed to do, by which the fraud is to be perpetrated or consummated. *Pettibone v. United States*, 148 U.S. 197-202, 13 Supt. Ct. 542, 37 L. Ed. 419; *United States v. Hess*, 124 U.S. 483-486, 8 Sup. Ct. 571, 31 L. Ed. 516; *United States v. Britton*, 108 U.S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. *The defendants in such an indictment, aside from meeting the overt acts, are required to be prepared to defend themselves against proof that they agreed to do the acts charged as having been agreed to be done. They are not to be called upon—they are not required to be prepared—to show that they did not make or enter into an agreement, the terms of which are not fairly stated or set forth in the indictment.* It is not sufficient to charge the crime in the words of the statute, or to state an agreement to do acts which, if done, would not operate

to defraud the United States. *United States v. Cruickshank et al.*, 92 U. S. 558, 559, 23 L. Ed. 588, and cases there cited.” (Emphasis added.)

If it was the contention that Cain became a member of the conspiracy after it was formed, such charge, if made in the indictment, would have informed him of what he was to meet.

The Court said in *United States v. Atlanta Journal Co.*, 185 Fed. 656, 662:

“These are the only instances under the acts of Congress in which a publication having the other requisites and admitted to the second class would violate the law by mailing under the second-class rate. *In a case like this, charging a crime under section 5440 of the Revised Statutes (page 3676, U. S. Comp. St. 1901, it should not be necessary to gather the case from mere inference, but it should charge with reasonable certainty that which would constitute an offense under the law. Many authorities might be cited in support of this.*” (Emphasis added.)

Likewise the rule is announced in *Smith v. United States*, 157 Fed. 721, 725:

“A fundamental and well-established rule necessary to be observed in all cases is that all the essential elements of the offense must be averred in the indictment, and that, too, with sufficient clearness and particularity to enable the accused to understand the nature of the charge against him, to intelligently prepare to meet it, and to plead the result, whether conviction or acquittal, as his protection against another prosecution for the same offense.”

In *United States v. Grossman*, 55 Fed. (2d) 408, the Court held that where one was charged with having become a member of a conspiracy after it had been formed, he was entitled to a bill of particulars showing what his acts were that tended to effect the purpose of the conspiracy and how they did so, saying at 411:

“In view of the admitted fact that the defendant Grossman did not become chief of police of the city of Long Beach until January 1, 1930, and the conspiracy deals with his acts as chief of police, and that the indictment makes use of the words ‘protection’ and ‘interference’, which seems to be a conclusion, and that the paragraph containing these words is ambiguous, to say the least, if not containing a greater defect, the motion for a bill of particulars will be granted.

“The government will not be disclosing its evidence by filing a bill of particulars setting forth what the ‘interference’ and ‘protection’ of the defendant Grossman consisted of, and the approximate time thereof.”

This fundamental rule of law requires no further citation of authority to establish it. The indictment charging that Cain conspired and agreed prior to March 10, 1944, did not inform him that he was to meet a charge of conspiring or adhering to a previously formed conspiracy subsequent to this date. He is entitled to stand upon the indictment as to when and how he is charged to have become a member of the conspiracy.

III.

WHEN THE JURISDICTION OF THE COURT TO TRY A CONSPIRACY CHARGE DEPENDS UPON THE ALLEGATIONS OF THE PLACE WHERE THE OVERT ACTS WERE COMMITTED, FACTS SHOWING THE RELEVANCY OR MANNER IN WHICH THE OVERT ACTS FURTHERED OR TENDED TO FURTHER THE OBJECT OF THE CONSPIRACY MUST BE ALLEGED IN THE INDICTMENT. MERE CONCLUSIONS OF THE PLEADER WILL NOT SUFFICE.

In considering the sufficiency of an indictment of conspiracy in relation to showing the relevancy of the overt acts, we must distinguish those cases where under the particular law there is no necessity of alleging overt acts, those cases in which the overt acts alleged are in themselves unlawful, and those cases where the connection between the conspiracy and the overt act is inherent from the act itself, e.g., renting a post office box in a charge of conspiracy to use the mails to defraud. The case at bar falls within none of the foregoing classifications. All of the overt acts here alleged are in and of themselves innocent acts. There is nothing inherent in any of them that shows any connection with the conspiracy charged. Therefore, the indictment, by appropriate allegations, must show the relevancy of the acts alleged. It is true that the indictment here alleges "to effect the object thereof" and "in furtherance of said conspiracy" the acts were done. We believe the indictment is subject to the defect pointed out in *United States v. Dowling*, 278 Fed. 630, 639, where the court said:

"It might be that, if it was charged that they adjourned to go their several ways to carry out and effect the object of the conspiracy, or with

intent of effecting the object, this would be sufficient; but, *unless it was charged that the act was committed for the purpose or with the intent of effecting the object of the conspiracy, it would be clearly insufficient, even under the Collier Case. This would be so, if for no other reason than because of the presumption of innocence which would be implied in the absence of allegations of purpose or intent that the person acting as alleged in the overt acts did so innocently, and hence on his own account only, and not to effect the object of the conspiracy. All intendments are against the pleader. No inference of intent or purpose will be indulged in to supply the omission of this essential element of an offense under section 37 of the Criminal Code.*" (Emphasis added.)

In *Tillinghast v. Richards*, 225 Fed. 226, 231, the Court says:

"Jurisdiction may be founded upon an overt act, as the hiring of a post office box in pursuance of a plan (of using the mail to defraud), for there is an apparent connection between act and offense. See *Brown v. Elliott*, 225 U.S. 392, 32 Sup. Ct. 812, 56 L.Ed. 1136. It would be quite another thing to allege, for example, in this case, the hiring of a post office box as an overt act, for this would be in no apparent connection with the alleged plan. *A pleader should not be permitted to allege isolated acts, and the court required upon his mere allegation that they were done pursuant to the conspiracy, and without the slightest idea whether this is true or not, to take the pleader's word, instead of himself seeing*

whether the act alleged was relevant or not. In the present case, for example, it seems that the pleader is mistaken in his notion that the purchase of palm oil could possibly be an act to effect the unlawful removal of oleomargarine containing it from the factory at Providence. I am quite convinced, also, that the use of this palm oil in the manufacture of oleomargarine at Providence could not, in any way, effect the object of unlawfully removing it. There are instances where the impossibility of the allegation is apparent on the face; but the rule, I think, is not altered if the act alleged is one which may or may not be an act to effect the object. A charge of crime must not be equivocal. *The court must find it on the facts alleged, and not in the pleader's conclusions as to logical connection of facts.*" (Emphasis added.)

The indictment in the case at bar is contrary to every principle announced by the foregoing authority. Nowhere in the indictment is there any allegation of the manner in which the overt acts alleged furthered or tended to accomplish the objects of a conspiracy. All that is alleged in this regard is that the defendants, to effect the object of a conspiracy and in furtherance thereof, committed the overt acts alleged. This is only a conclusion of the pleader.

In *Tillinghast v. Richards, supra*, at p. 230, the Court says:

"Since the decisions in *Hyde v. United States*, and in *Brown v. Elliott*, 225 U.S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136, however, I am of the opinion that *U.S. v. Donau*, which was decided when

the law was understood to be that the overt act was not a part of the offense and not a jurisdictional fact, and cases which have followed it, are of doubtful authority. Where the overt acts and the conspiracy are in the same place, local jurisdiction may rest entirely upon the conspiracy. *Where, however, the jurisdiction of the court depends solely upon the alleged overt act* (see *Brown v. Elliott*, 225 U.S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136), *it must be alleged with all the definiteness and certainty of any other jurisdictional fact; and certainly it should be made to appear by the allegations of the indictment that there was a connection between the act done and the plan.* If a rule of pleading is adopted which permits a constructive presence to be alleged in the same terms as an actual presence, and this upon the foundation of a bare allegation that an act apparently isolated was done in pursuance of a plan with which it has no apparent connection, then the prima facie effect of an indictment as evidence of probable cause is entirely destroyed.” (Emphasis added.)

In *Boykin v. United States*, 11 Fed. (2d) 484, 485, the Court said:

“We are of opinion that the indictment is fatally defective, and that the demurrers should have been sustained. The offense here sought to be charged is made up of an act and an intent. The criminal intent is made to relate to matters which the statute wisely describes in the most general terms, so as to include every breach of duty which an official may be influenced or induced to commit. It is to be observed that the

language used in the indictment is as general as is the language of the statute. Where a statute is general, it is not sufficient merely to follow its language in an indictment, but the indictment must allege the specific offense coming under the general description of the statute, in order that the accused may enjoy the right, secured by the Sixth Amendment, 'to be informed of the nature and cause of the accusation' against him. *United States v. Cruickshank*, 92 U.S. 542, 23 L.Ed. 588; *United States v. Hess*, 8 S.Ct. 571, 124 U.S. 483, 31 L.Ed. 516; *Foster v. United States*, 253 F. 481, 165 C.C.A. 193; *Miller v. United States (C.C.A.)*, 288 F. 817; *Bishop's New Criminal Procedure*, §§ 568, 569, 570. In this case the testimony tended to show that it was the intent of defendants to influence and induce Gonzauillas not to investigate and not to report them to the district attorney for illegal sales of liquor. Gonzauillas, according to his testimony, accepted the bribe, but only for the purpose of making a case against the defendants.

"The representatives of the government knew the acts which they would rely on to show a corrupt intent. But it is impossible, as it appears to us, to ascertain from the indictment what acts would be relied on at the trial. Nothing but conclusions are stated. No facts are alleged from which it could be determined whether the proceedings pending or to be brought before the prohibition agent related or would relate to violations of the National Prohibition Act, or what the fraud charged consisted of, or what acts it was the intention of the defendants to induce the prohibition agent to omit to do. The trial court

was wholly without information as to the facts relied on, and could not possibly have determined whether the matters complained of were such as could affect the official duties of the prohibition agent.”

A good discussion of the subject of venue is to be found in *United States v. Safeway Stores*, 51 Fed. Supp. 448.

In the case at bar the allegations of the overt acts are all typical. The first overt act is alleged:

“1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearney Street, San Francisco, California;” (P. R. 3.)

Certainly, there is nothing inherently wrong in the act of Newman, Malaby, Shaffer and Files meeting together. How, or in what manner this act of meeting together effected or tended to effect the object of the conspiracy the indictment is entirely silent. It is only the conclusion of the pleader that such act effected or tended to effect the object of the conspiracy. If we leave out of the indictment the words “to effect the object thereof” and “in furtherance of”, the indictment would read:

“and that thereafter and during the existence of said conspiracy one or more of said defendants * * * did * * * commit the following acts:”

In construing the sufficiency of the indictment, the conclusions of the pleader add nothing thereto. *Fuller v. United States*, 114 Fed. (2d) 698, 699. Hence, elimi-

nating the conclusions of the pleader, no relation whatsoever is shown between the conspiracy charged and the acts alleged. A somewhat similar question as here involved was involved in the case of *United States v. Ault*, 263 Fed. 800, wherein it was held that an indictment was insufficient where the overt acts alleged did not show in themselves that such acts effected the object of the conspiracy.

Each of the nine overt acts alleged, standing by themselves, are innocent acts. There is nothing inherent in any of the acts that show any connection with the conspiracy charged. The only thing in the indictment that tends to show that they were done in furtherance of the conspiracy charged is the allegation, by way of conclusion of the pleader, that they were done "to effect the object thereof" (P. R. 2) and "in furtherance of said conspiracy." (P. R. 3.) This manner of alleging is not sufficient, according to the foregoing authorities. This rule is of particular importance to Cain, since he knew he could and did disprove the conspiracy charged, he was given a further sense of security by the setting forth of overt acts innocent in themselves with no showing of any connection with the conspiracy charged.

The statements of the Court in *Tillinghast v. Richards*, supra, as to jurisdiction are particularly appropriate to the case at bar. In the case at bar the jurisdiction of the Court is not fixed by the charge of conspiracy, but attempted to be fixed by alleging that the overt acts were done within the trial Court's

jurisdiction. Here the jurisdiction of the trial Court depended solely upon the alleged overt acts, therefore it should have been made to appear with definiteness and certainty by the allegations of the indictment that there was a connection between the overt acts done and the plan charged.

Under Amendment VI of the Constitution, the accused is entitled to be tried in the state and district wherein the crime shall have been committed. Hence the venue is the same as jurisdiction. In *People v. Wakao*, 33 Cal. App. 454, 456, the Court said:

“Venue means place of trial and place of trial means the jurisdiction of the Court which, in the present case, is limited by the constitution to one of the two counties mentioned therein.”

At page 457, this Court said further:

“In *People v. Terrill*, 127 Cal. 99, 100, (59 Pac. 836, 837), the Court said: ‘It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct, positive averment in the language of the statute, or its equivalent, or by stating facts which show that such crime has been committed. In no case will the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence and if facts stated may or may not constitute a crime the presumption is that no crime is charged.’ The rule was much discussed in *People v. Schmitz*, 7 Cal. App. 330, 365, (15 L.R.A. (N.S.) 717, 94 Pac. 407, 419), and see opinion of Supreme Court on petition for hearing in that

Court. *Not only is it essential that a crime be charged, but it must also appear that the Court has jurisdiction to hear and determine the case.*" (Emphasis added.)

In the case at bar, without a direct and positive allegation of fact showing a relevancy between the overt acts alleged and the conspiracy charged, it does not appear that the Court had jurisdiction to hear and determine the case.

The Court said in *Bratton v. United States*, 73 Fed. (2d) 795, 798:

"Furthermore, no venue of any act of concealment is alleged. As far as the failure to disclose to federal authority is concerned, the venue is the place where the report should have been made. *Rumely v. McCarthy*, 250 U. S. 283, 39 S. Ct. 483, 63 L. Ed. 983; *United States v. Lombardo*, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897; *United States v. Commerford* (C.C.A. 2) 64 F. (2d) 28. Even that is only inferentially alleged, as it requires the defendant to know that the officers to whom the disclosure should be made have their offices in the district where the indictment was returned. If one could infer an affirmative act of concealment from the naked allegation of this indictment, or from the bribery, nowhere does the indictment intimate that such act took place in this district; it might well have been that the act of concealment took place a few miles away in the Eastern or Northern District. While failure to allege venue directly is not a jurisdictional defect in the sense that it will support a collateral attack (*Knewel v. Egan*, 268 U. S. 442,

45 S. Ct. 522, 69 L. Ed. 1036; *United States v. Pridgeon*, 153 U. S. 59, 14 S. Ct. 746, 38 L. Ed. 631), yet the federal cases, and some from the state Courts, hold an indictment failing to allege venue is demurrable. *Patterson v. United States*, (C.C.A. 6) 222 F. 599, 626; *United States v. Christopherson* (D. C., E. D. Mo.) 261 F. 225; *United States v. Jenks* (D. C. E. D. Pa.) 258 F. 763; *United States v. Marx* (D. C. E. D. Va.) 122 F. 964; *Hughes on Fed. Prac.* §7035. *In addition, a failure to state, with some degree of certainty, where the alleged offense took place renders the indictment open to the objection that it does not fairly apprise the accused of the facts charged, and denies him the right to a plea of former conviction or acquittal if later charged with the same offense.* *Skelley v. United States* (C.C.A. 10) 37 F. (2d) 503. *When it is recalled that the Sixth Amendment gives the accused a right to trial in the 'district wherein the crime shall have been committed,' a failure to allege that the crime was committed in the district is inexcusable.*

The government challenges our right to notice the fatal defects in the indictment because the record discloses no formal exception to the order of the Court overruling the demurrer to the indictment. We are cited to cases which hold that an exception is necessary to test the correctness of rulings on questions not arising on the record. If the point were well taken, this case would fall under the rule that Courts may notice plain and grievous errors which have deflected the course of justice. *Williams v. United States* (C.C.A. 10) 66 F. (2d) 868.” (Emphasis added.)

See *Brightman v. United States*, 7 Fed. (2d) 532, 534:

“The presumption of the statute alone, however, was not sufficient for conviction. Before the defendant could properly be convicted, it was necessary for the government to go further and prove that the venue was the Western district of Oklahoma. This was a prerequisite to a conviction, and the foundation of this prerequisite is contained in the Sixth Amendment to the Constitution of the United States, which provides: ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.’ Wharton Crim. Ev. (10th Ed.) § 106a; *Vernon v. United States*, 146 F. 121, 76 C.C.A. 547 (this Court); *Moran v. United States* (C.C.A.) 264 F. 768; *Underwood v. United States*, (C.C.A.) 267 F. 412; *Tuckerman v. United States* (C.C.A.) 291 F. 958, 967.

In the Vernon Case, this Court said: ‘Under this constitutional provision, the venue is as material as any other allegation in the indictment, and the burden to prove it rests upon the government.’

It might be claimed that the prima facie evidence arising under the statute renders proof of the venue unnecessary. We do not think that the presumption or prima facie evidence of the statute includes the venue. The wording of the statute does not indicate such an intention on the part of Congress. The statute provides that

‘the absence of appropriate tax-paid stamps * * * shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.’

In the instant case, the violation of the section was the unlawful purchase alleged. *The venue was not an element of the offense. It was an independent matter, necessary, however, to be alleged and proven.*” (Emphasis added.)

See *United States v. Great Western Sugar Co.*, 39 Fed. (2d) 152, 154:

“The next pleas are to the jurisdiction, and must be sustained upon substantially the same ground. It is not claimed that the conspiracy was formed in Nebraska, nor is it localized here by any specific allegation, except that some of the beets were taken and paid for here. *I am satisfied those acts neither furthered the conspiracy nor manifested it in existence or operation, and therefore the conspiracy is not shown to have come within the territorial jurisdiction of this Court.*” (Emphasis added.)

A failure to accord an accused the rights given him under said Sixth Amendment, goes to the Court’s jurisdiction.

Ex parte Bain (121 U. S. 1), 30 L. Ed. 849.

Jurisdiction cannot be waived.

United States v. Norris (281 U. S. 619), 74 L. Ed. 1076.

IV.

SINCE CAIN WAS NOT SHOWN TO HAVE BEEN A MEMBER OF THE CONSPIRACY, AS LAID IN THE INDICTMENT, THE ADMISSION INTO EVIDENCE OF STATEMENTS MADE NOT IN HIS PRESENCE WAS ERROR AND SUCH STATEMENTS WERE HEARSAY.

The Court said, in *Tingle v. United States*, 38 Fed. (2d) 573, 575:

“Mere irregularity in the order of proof is generally permissible within the sound discretion of the Court, and will not constitute reversible error provided the record ultimately contains evidence which renders competent and material that which has thus been admitted out of order. *But in conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained.* This statement requires no citation of authorities.” (Emphasis added.)

The rule of the foregoing case requires no extended discussion. The discussion of the preceding points has demonstrated that Cain disproved any connection with conspiracy charged in the indictment. He was therefore convicted on evidence which, as to him, was clearly inadmissible.

SUMMARY.

We submit that the foregoing points and authorities conclusively demonstrate that: (1) not only did the prosecution fail to prove that Cain was a member of the conspiracy charged but the evidence conclusively proved that he was not. The conspiracy charged in the indictment is alleged to have been formed prior to March 10, 1944. At or prior to this date Cain had never met and did not know any of the other accused. (2) That Cain was convicted of an offense not charged in the indictment and of which he knew nothing until the course of the trial and hence was in no way prepared to defend himself. (3) That the Court was without jurisdiction either to hear and determine the conspiracy charged in the indictment or that of which Cain was convicted, and (4) Cain was convicted of something not charged in the indictment and on hearsay evidence.

We respectfully submit that the petition for a rehearing herein should be granted and that the judgment of conviction of Appellant Cain should be reversed.

Dated, San Francisco, California,
June 28, 1946.

SIMEON E. SHEFFEY,
Attorney for Appellant
and Petitioner Burt Cain.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for Burt Cain, appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
June 28, 1946.

SIMEON E. SHEFFEY,
*Of Counsel for Appellant
and Petitioner Burt Cain.*

No. 10991

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE J. BUZAS,

Appellant,

vs.

PETER CASSENOS and JOSEPH P. MOORE,
Sheriff of the County of Napa, State of California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,

Northern Division

FILED

APR 23 1945

PAUL P. O'BRIEN,
CLERK

No. 10991

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE J. BUZAS,

Appellant,

vs.

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Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on	72
Cost Bond on	67
Designation of Contents of Record on, Appellant's (DC)	70
Designation, Appellant's (DC)	70
Designation of Contents of Record on, Appellee's (CCA)	74
Notice of	66
Statement of Points to be Relied Upon on, Appellant's	75
Certificate of Clerk to Transcript of Record on Appeal	72
Cost Bond on Appeal	67
Designation of Contents of Record on Appeal, Appellant's (DC)	70
Designation of Contents of Record on Appeal, Appellee's (CCA)	74
Discharge of Bankrupt	20

Index	Page
Exhibits for Bankrupt—Papers Filed in Case No. 8374 in the Superior Court of Cali- fornia:	
1—Complaint	30
2—Order of Execution	33
3—Instructions to Sheriff.....	34
4—Order of Execution	35
5—Notice of Sheriff's Sale	37
6—Statement of Goods Sold	39
7-8—Sheriff's Certificate of Sale on Ex- cution	39-41
9—Disbursements and Sheriff's Costs	43
“A”—Judgment	44
Hearing on Return of Order to Show Cause..	46
Witness for Bankrupt:	
Claussen, John Jr.	
—direct	46
—cross	59
Names and Addresses of Attorneys of Record	1
Notice, Denying and Dissolving Restraining Order	60
Notice of Appeal	66
Opinion	61
Order of Adjudication and Reference, etc.....	19

Index	Page
Order to Show Cause and Temporary Restraining Order	28
Petition for Order to Show Cause Why Legal Proceedings Should Not Be Stayed, to Make Permanent Temporary Restraining Order, and for Turnover Order	21
Petition of Debtor	2
Schedule A—Statement of All Debts of Bankrupt	4
Schedule B—Statement of All Property of Bankrupt	8
Summary of Debts and Assets	13
Statement of Affairs	14
Statement of Points to be Relied Upon on Appeal, Appellant's	75

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In the District Court of the United States
for the Northern District of California

In Bankruptcy—No. 9490

In the matter of

GEORGE J. BUZAS,

Bankrupt.

To the Honorable Judge of the District Court of
the United States for the Northern District of
California

DEBTOR'S PETITION

The Petition of George J. Buzas, residing at Route 1, Box 657a, in Vallejo, County of Solano, State of California, by occupation a Laborer on the United States Navy Yard at Mare Island, California for the last two months; prior thereto farmer.

Respectfully Represents:

1. Your petitioner has resided at the above address, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains

a full and true statement of all his debts, and as far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore Your Petitioner Prays, That he may be adjudged by the court to be a bankrupt within the purview of said Act.

BRANTLEY W. DOBBINS

HARLOW V. GREENWOOD

Attorneys for Petitioner

520 Marin Street, Vallejo,
Calif.

GEORGE J. BUZAS

Petitioner.

United States of America,
State of California,
County of Solano—ss.

I, George J. Buzas the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

GEORGE J. BUZAS

Petitioner

Subscribed and sworn to before me this 26th day of March, 1941.

BRANTLEY W. DOBBINS
Notary Public in and for the County of Solano,
State of California.

[Endorsed]: Filed April 4, 1941. [1*]

Schedule A.—STATEMENT OF ALL DEBTS OF
BANKRUPT

Schedule A-1

Statement of all Creditors to Whom Priority is Secured
by the Act

Claims which have priority.	Amount due or claimed
(a)	\$ Cts.
Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding \$600 each earned within three months before filing the petition	none
(b)	
Taxes due and owing to—	
(1) The United States	none
(2) The State of	none
(3) The county, district or municipality of..... State of	none
(c)	
(1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority:	

Loan due Farm Credit Administration (Emergency Crop and Feed Loan) on 1937 crop; mortgage dated Aug. 31, 1937; mortgage recorded in Vol. 119, page 139, Napa County records; amount due \$270.85 with interest at 4% from August 31, 1937	270.85
---	--------

(2) Rent owing to a landlord who is entitled to priority by the laws of the State of California, accrued within three months before filing the petition, for actual use and occupancy: Refer to Schedule B-1; rent due October 1st, 1940, on lease in the sum of \$200.00 not paid; Note: rent due herein more than 3 months prior to filing said petition	200.00
--	--------

Total.....	\$470.85
------------	----------

GEORGE J. BUZAS, Petitioner.	[2]
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Schedule A-2

CREDITORS HOLDING SECURITIES

[N.B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.]

None

GEORGE J. BUZAS, Petitioner.	[3]
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Schedule A-3

CREDITORS WHOSE CLAIMS ARE UNSECURED

Napa Milling & Warehouse Co., Napa, Calif., for fertilizer	\$ 16.75
Petaluma Box Corporation, Petaluma, Calif., for lug boxes	11.00

Schedule A-3—(Continued)

Peter Freskan, Napa Road, Vallejo, Calif., Rural Deliver, for labor in 1938	27.00
John Coronado, Napa Road, Vallejo, Calif., Rural Deliver, for labor in 1938	75.00
Frank Collins, Napa Road, Vallejo, Calif., Rural Deliver, for rent property in 1938	185.00
Roy Mollison, 621 Porter Street, Vallejo, Calif., for excavating pit for water	200.00
H. Shwarz Co., 918 Main Street, Napa, Calif., for farming implements	45.41
U. S. Civil Service Training School, Seattle, Washington, for enrollment contract in correspondence course	50.00
Monarch Box and Lumber Co., Inc., 4901 Tidewater, Oakland, Calif., for lug boxes	145.00
Peter Cassenos, Napa Road, Vallejo, Calif., claim for damages; Note: Said Cassenos filed suit December 7, 1940, in the Superior Court of Napa County for said amount, but to date has not taken default or had judgment entered in said action	900.00
Baxter Knight, Vallejo, California for plowing and preparing ground for planting tomatoes	16.00
Bruno Getz, Napa, California, purchased from Getz gasoline motor on conditional sales contract for \$60.00; paid on account \$20.00, balance due on said contract	40.00
Curley Company, 219 Drumm Street, San Francisco, California, purchased on contract from said company 1000 lug boxes at a cost of \$50.00, paid on account \$32.00, balance due on said contract	18.00
Total.....	\$1,729.16

GEORGE J. BUZAS,
Petitioner.

[4]

Schedule A-4

LIABILITIES ON NOTES, OR BILLS DISCOUNTED
WHICH OUGHT TO BE PAID BY DRAWERS,
MAKERS, ACCEPTORS OR INDORSERS.

None

GEORGE J. BUZAS

[5]

Schedule A-5

ACCOMMODATION PAPER

[N.B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.]

None

GEORGE J. BUZAS

Petitioner.

OATH TO SCHEDULE A

United States of America,
State of California, County of Solano—ss.

I, George J. Buzas, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to Bankruptcy, according to the best of my knowledge, information, and belief.

GEORGE J. BUZAS,

Petitioner.

Subscribed and sworn to before me this 26th day of March, 1941.

[Seal]

BRANTLEY W. DOBBINS,

Notary Public in and for the County of Solano, State of California.

[6]

**Schedule B.—STATEMENT OF ALL PROPERTY
OF BANKRUPT**

Schedule B-1

REAL ESTATE

Location and Description of all real estate owned by debtor, or held by him, whether under deed, lease or contract.	Estimated Value of debtor's interest
--	---

Lease dated Sept. 10th, 1938, between Chas. E. Walsh and Geo. Buzas covering 50 acres in Napa County, California, hereinafter described; Said lease is for 5 years, terminating on Sept. 30th, 1941, at an annual cash rent of \$200.00 per annum, payable annually in advance; Said property covered by said lease is described as follows, to-wit:

All that certain, lot, piece or parcel of land situate near the southern boundary of the County of Napa, State of California, and bounded and particularly described as follows, to wit:

Commencing at a point of the Spring Road where a fence divides the land of Charles Walsh from the lands of Mini thence running westerly along the northerly line of the Mini land to the property of Leo Walsh, thence northerly along the east line of the land of Leo Walsh, to the land of the late Margaret Walsh, thence easterly along the south line of the land of the late Margaret Walsh to the Spring Road, thence southerly along the west side of the Spring Road to the point of commencement. Containing fifty (50) acres more or less.

NO VALUE

Total.....

GEORGE J. BUZAS,
Petitioner.

[7]

Schedule B-2

PERSONAL PROPERTY

	\$	cts.
A. Cash on hand	None	
B. Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately)	None	
C. Stock in trade in.....business of.....at..... of the value of	None	
D. Household goods and furniture, household stores, wearing apparel, and ornaments of the person	None	
E. Books, prints and pictures	None	
F. Horses, cows, sheep and other animals, (with number of each): None, except 1 dozen chickens....	7.50	
G. Automobiles and other vehicles: Registered owner 1935 Ford V-8 Pickup truck, 1940 License #5C677, Legal owner Mercantile Acceptance Corporation of California, 333 Montgomery Street, San Francisco, Calif., owes \$234.00 equity	95.00	
H. Farming stock and implements of husbandry: Old tractor, value	\$ 5.00	
Old disc	40.00	
	45.00	
I. Shipping and shares in vessels	None	
J. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated: Pump, valued \$12.00; 700 feet of 3" pipe casing \$75.00; 1000 feet of 4" irrigation pipe \$75.00; 2 old water tanks, one 8000 gallon, one 10000 gallon, \$45.00	207.00	
K. Patents, copyrights and trademarks	None	
L. Goods or personal property of any other description, with the place where each is situated: 50 gallons of new wine, 3 months old.....	20.00	
Equity in gasoline motor belonging to Bruno Getz	20.00	
Equity in 1000 lug boxes of Curley Company....	32.00	
Total.....	\$ 426.50	

GEORGE J. BUZAS,
Petitioner.

Schedule B-3

CHOSSES IN ACTION

	\$	Cts.
A. Debts due petitioner on open account	None	
B. Policies of insurance	None	
C. Unliquidated claims of every nature with their estimated value	None	
Deposits of money in banking institutions and elsewhere	None	
Total.....		

GEORGE J. BUZAS,

Petitioner.

[9]

Schedule B-4

PROPERTY IN REVERSION, REMAINDER OR EXPECT-
ANCY, INCLUDING PROPERTY HELD IN TRUST
FOR THE DEBTOR OR SUBJECT TO ANY POWER
OR RIGHT TO DISPOSE OF OR TO CHARGE.

[N.B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General Interest	Particular Description	Estimated Value of Interest
		\$ Cts.
Interest in land		None
Personal property		None
Property in money, stocks, shares, bonds, annuities, etc.		None
Rights and powers, legacies and bequests		None
Property heretofore conveyed for benefit of creditors		None

Amount Realized as Proceeds of Property Conveyed	
	\$ Cts.
Portion of debtor's property conveyed by deed of assign- ment or otherwise, for benefit of creditors; date of such deed, name and address of party to whom con- veyed; amount realized therefrom and disposal of same, as far as known to debtor	None
Attorney's fees: Attorney's fees paid Harlow V. Green- wood and Brantley W. Dobbins, Attorneys, 520 Marin Street, Vallejo, California, \$71.87 as follows: \$45.00 for Court costs and filing fees and \$26.87 on account of fees	71.87
Total.....	71.87

GEORGE J. BUZAS,
Petitioner. [10]

Schedule B-5

PROPERTY CLAIMED AS EXEMPT FROM THE OPERA-
TION OF THE ACT OF CONGRESS RELATING TO
BANKRUPTCY.

[N.B.—Each item of property must be stated, with its valua-
tion, and, if any portion of it is real estate, its location, descrip-
tion and present use.]

	Valuation
	\$ Cts.
Property claimed to be exempt by the laws of the United States, with reference to the statute creat- ing the exemption	None
Total.....	

GEORGE J. BUZAS,
Petitioner. [11]

Schedule B-6

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING
TO DEBTOR'S BUSINESS AND ESTATE

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books	None
Deeds	None
Papers	None

GEORGE J. BUZAS,
Petitioner.

OATH TO SCHEDULE B

United States of America,
State of California, County of Solano—ss.

I, George J. Buzas, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

GEORGE J. BUZAS,
Petitioner.

Subscribed and sworn to before me this 26th day of March, 1941.

(Seal) BRANTLEY W. DOBBINS,
Notary Public in and for the County of Solano, State of California.

SUMMARY OF DEBTS AND ASSETS

[From the statements of the debtor in Schedules A and B.]

Schedule A—1-a	Wages	None
Schedule A—1-b (1)	Taxes due United States.....	None
Schedule A—1-b (2)	Taxes due States	None
Schedule A—1-b (3)	Taxes due counties, districts and municipalities	None
Schedule A—1-c (1)	Debts due any person, including the United States, having pri- ority by laws of the United States	270.85
Schedule A—1-c (2)	Rent having priority	200.00
Schedule A—2	Secured claims	None
Schedule A—3	Unsecured claims	1729.16
Schedule A—4	Notes and bills which ought to be paid by other parties thereto	None
Schedule A—5	Accommodation paper	None
Schedule A, Total.....		2200.01
Schedule B—1	Real Estate	None
Schedule B—2-a	Cash on Hand	None
Schedule B—2-b	Negotiable and non-negotiable instruments and securities.....	None
Schedule B—2-c	Stock in trade	None
Schedule B—2-d	Household goods	None
Schedule B—2-e	Books, prints and pictures.....	None
Schedule B—2-f	Horses, cows, and other animals	7.50
Schedule B—2-g	Automobiles and other vehicles	95.00
Schedule B—2-h	Farming stock and implements	45.00
Schedule B—2-i	Shipping and shares in vessels..	None
Schedule B—2-j	Machinery, fixtures, and tools....	207.00
Schedule B—2-k	Patents, copyrights, and trade- marks	None
Schedule B—2-l	Other personal property	72.00
Schedule B—3-a	Debts due on open accounts.....	None
Schedule B—3-b	Policies of insurance	None
Schedule B—3-c	Unliquidated claims	None
Schedule B—3-d	Deposits of money in banks and elsewhere	None

Summary of Debts and Assets—(Continued)

Schedule B—4	Property in reversion, remainder, expectancy or trust	None
Schedule B—5	Property claimed as exempt \$.....	
Schedule B—6	Books, deeds and papers	None
Schedule B, Total.....		\$ 426.50

GEORGE J. BUZAS,
Petitioner.

[13]

In the Northern Division of the United States Dis-
trict Court, Northern District of California

In Bankruptcy—No.....

In the Matter of

GEORGE J. BUZAS,

Bankrupt.

STATEMENT OF AFFAIRS

(For Bankrupt or Debtor not Engaged in Business)

(Note—Each question should be answered or the failure to answer explained. If the answer is “none”, this should be stated. If additional space is needed for the answer to any question, a separate sheet, properly identified and made a part hereof, should be used and attached.)

The term “original petition” as used in the following questions, shall mean the petition filed under Section 3b or 4a of Chapter III, Section 322 of Chapter XI, Section 422 of Chapter XII, or Section 622 of Chapter XIII.)

1. Name and residence.

a. What is your full name? George J. Buzas.

b. Where do you now reside? Route 1, Box 657a, Vallejo, California.

c. Where else have you resided during the six years immediately preceding the filing of the original petition herein? Same place for fifteen years.

2. Occupation and income.

a. What is your occupation? Laborer for last two months; prior thereto farmer.

b. Where are you now employed? Mare Island Navy Yard.

(Give the name and address of your employer, or the address at which you carry on your trade or profession, and the length of time you have been so employed.) Working for U. S. Government since November 5th, 1940.

c. Have you been in partnership with anyone, or engaged in any business, during the six years immediately preceding the filing of the original petition herein? Never in partnership with anyone.

(If so, give particulars, including names, dates and places.) Prior to November 5th, 1940, was truck gardening, especially in raising tomatoes.

d. What amount of income have you received from your trade or profession during each of the two years immediately preceding the filing of the original petition herein? Since 1937 made no money in business and was on relief from March to October 1940.

e. What amount of income have you received

from other sources during each of these two years? None.

3. Income tax returns.

a. Where did you file your last federal and state income tax returns, and for what years? Never filed any. [14]

4. Bank accounts and safe deposit boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein? (Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.) Have had no account since 1938.

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities cash or other valuables, within the two years immediately preceding the filing of the original petition herein? None.

5. Books and records.

a. Have you kept books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein? Never kept books of account.

b. In whose possession are these books or records? See Answer to 5-A above.

c. Have you destroyed any books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein? No.

6. Property held in trust.

a. What property do you hold in trust for any other person? None.

7. Prior bankruptcy or other proceedings; assignments for benefit of creditors.

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein? None.

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee? No.

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein? No.

8. Suits, executions and attachments.

a. Have you been party plaintiff or defendant in any suit within the year immediately preceding the filing of the original petition herein? Yes.

(If so, give the name and location of the court, the title and nature of the proceeding, and the result.)
Peter Cassenos as plaintiff vs. George Buzas, as defendant, Superior Court of Napa County, California, Case No. 8314; Case still pending [15]

b. Has any execution or attachment been levied against your property within the four months immediately preceding the filing of the original petition herein? Not that I know of.

9. Loans repaid.

a. What repayments of loans have you made dur-

ing the year immediately preceding the filing of the original petition herein? Made no loans during year and repaid none.

10. Transfer of property.

a. What property have you transferred or otherwise disposed of during the year immediately preceding the filing of the original petition herein? None.

(Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative the relationship, the consideration, if any, received therefor, and the disposition of such consideration.) Except sold water tank about six months ago for \$20.00.

11. Losses.

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the original petition herein? None.

GEORGE J. BUZAS

.....

(Bankrupt or Debtor)

State of California

County of Solano—ss.

I, George J. Buzas the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

GEORGE J. BUZAS

.....

(Bankrupt or Debtor)

Subscribed and sworn to before me this 26th day of March, 1941.

[Seal]

BRANTLEY W. DOBBINS

Notary Public in and for the County of Solano,
State of California. [16]

[Title of District Court and Cause.]

No. 9490—In Bankruptcy

ORDER OF ADJUDICATION AND
REFERENCE, ETC.

At Sacramento, in said District, on the 4th day of April, 1941.

The Petition of George J. Buzas filed on the 4th day of April, 1944, that George J. Buzas be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered; and no opposition being made thereto.

It Is Adjudged that the said George J. Buzas is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it hereby is referred to Shirley K. McMullin one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act, and that the said George J. Buzas shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in Vallejo "Chronicle", a newspaper published in the County of Solano, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated April 4, 1941.

MARTIN I. WELSH

District Judge.

[Endorsed]: Filed Apr. 4, 1941. [17]

[Title of District Court and Cause.]

DISCHARGE OF BANKRUPT

At Santa Rosa, in said district, on the 18th day of November, 1941.

It appearing that George J. Buzas, of Vallejo in the County of Solano, State of California, was duly adjudged a bankrupt on a petition filed by him on the 4th day of April, 1941; and

It further appearing that, after due notice by mail, no objection to the discharge of said bankrupt was filed within the time fixed by the court;

It is ordered that the said George J. Buzas be, and he hereby is, discharged from all debts and claims which are made provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in bankruptcy.

Made and Filed November 18, 1941.

SHIRLEY K. McMULLIN

Referee in Bankruptcy.

[Endorsed]: Filed Nov. 26, 1941. [18]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
WHY LEGAL PROCEEDINGS SHOULD
NOT BE STAYED, FOR TEMPORARY RE-
STRAINING ORDER TO BE MADE PER-
MANENT AFTER HEARING, AND FOR
TURNOVER ORDER

To the Honorable Martin I. Welsh, Judge of the
United States District Court for the Northern
District of California, Northern Division:

Now comes, George J. Buzas, the bankrupt above
named and respectfully represents to this Honorable
Court:

That on April 4, 1941, your petitioner, filed his
voluntary petition in bankruptcy under and pursu-
ant to the provisions of the Bankruptcy Act and
on said April 4, 1941, your petitioner was duly and
regularly adjudged a bankrupt and reference of the
above entitled proceedings was duly and regularly
made to Honorable Shirley K. McMullen, Referee
in Bank- [19] ruptcy at Santa Rosa, California, in
said District;

That your petitioner filed in the above entitled
proceedings his true schedules of all of his assets

and liabilities as far as the same were known to him. In his schedules, and more particularly in his Schedule A-3 "Creditors Whose Claims Are Unsecured", your petitioner named and described in the manner following, an unsecured creditor, viz:

"Peter Cassenos, Napa Road, Vallejo, Calif., Claim for damages, Note: Said Peter Cassenos filed suit December 7, 1940, in the Superior Court of Napa County for said amount, but to date has not taken default or had judgment entered in said action"..... \$900.00

That said Superior Court action is one for treble damages based upon an alleged forcible and unlawful entry by petitioner upon real property, which by an agreement in writing, was leased to said creditor by petitioner on or about December 18, 1939, at the approximate annual rental of \$70.00, the term of which was to end approximately October 15 to November 15, 1940; that petitioner believing in good faith that said term had ended, took over said real property on November 16, 1940, by right of re-entry, all in accordance with and pursuant to the terms and provisions of said agreement in writing, as aforesaid; that the damages allegedly claimed by said creditor is alleged to be treble damages in the sum of \$900.00; that petitioner's entry upon said real property, was not, in and of itself, wrongful, nor intentionally done in willful or any disregard of petitioner's duty in the premises, but in accordance with the aforesaid right of re-entry.

That in the due administration of the above entitled proceedings, Notice of the First Meeting of Creditors, in these proceedings, was duly and regularly given to all the creditors named in petitioner's said Schedules; that said [20] notice was duly and regularly given as required by law to said creditor, Peter Cassenos, at his address, described as aforesaid;

That on November 18, 1941 by an order duly and regularly made by said Honorable Shirley K. McMullen, Referee in Bankruptcy, your petitioner was duly and regularly discharged from his debts provable, allowable and dischargable against him in the above entitled proceedings including the debt allegedly owing to said creditor, Peter Cassenos, listed in your petitioner's schedules and described as aforesaid;

That the alleged claim asserted by said creditor and hereinabove described, arose out of that certain civil action on or about December 7, 1940, or thereabouts in the Superior Court of the State of California, in and for the County of Napa, and being action No. 8374 of the Records of the Clerk of said Court, entitled Peter Cassenos, Plaintiff v. George Buzas, Defendant; that thereafter on or about March 8, 1941, said creditor cause the default of your petitioner to be entered in said action and upon said default a judgment was entered therein for the sum of \$900.00 and costs of \$9.75; that thereafter on September 8, 1942, and subsequent to the commencement of the above entitled bankruptcy proceedings, said creditor caused an execution to be

levied by the Sheriff of Napa County, John P. Steckter, upon the property of your petitioner, namely, a certain tomato crop, the sale of which took place on October 1, 1942, and said Sheriff took into his possession the proceeds of said sale, namely, the sum of \$150.00; that theretofore on September 30, 1942, your petitioner obtained an order from said Superior Court staying the proceedings in said action and impounding said sum of \$150.00 in the hands of the then said Sheriff; thereafter on or about February 10, 1943, the said Superior Court duly and regularly made its order vacating said judgment as aforesaid; that sub- [21] sequent thereto and on April 22, 1943, said creditor caused a later judgment to be entered in said action, and execution to issue thereon, April 22, 1943, pursuant to which and not until September 21, 1943, said Sheriff sold a certain quantity of wheat for the sum of \$330.20 and a tractor to said creditor for the sum of \$600.00, all of which property was acquired by petitioner subsequent to the commencement of the aforesaid bankruptcy proceedings, that the sum total of the proceeds recovered by said Sheriff is \$1,080.20; that your petitioner is informed and believes and upon said information and belief alleges the facts to be that said Sheriff, John P. Steckter, has never filed with the Clerk of said Superior Court his return upon said executions or either of them, and that in his capacity as Sheriff, he has retained a portion of said proceeds described as aforesaid, namely, the approximate sum of \$300.00 thereof, and that said approximate sum of \$300.00

has been, and now is, in the possession of said Sheriff's successor, Joseph E. Moore, the present Sheriff of Napa County, State of California;

That the proceedings in said Superior Court action and the successive writs of execution therein against the property of your petitioner, with full knowledge of the commencement, pendency and subsequent conclusion of the above entitled bankruptcy proceedings, were instituted by said creditor against your petitioner in violation of the authority of this Honorable Court and the said Order of Discharge; that said creditor's claim is a provable and dischargeable claim in the above entitled proceedings, and in view of the aforesaid allegations by your petitioner revealing the unusual circumstances attendant upon the levies of said writs of execution, an alleged claim for \$900.00 treble damages arising out of a tenancy for an annual rental of \$70.00, the [22] retention by said Sheriff and his successor of the proceeds acquired thereunder, and the failure to file the returns of said writs of execution, and as petitioner is informed and believes and upon said information and belief alleges the facts to be that said creditor will continue with the litigation in said Superior Court and will levy additional writs of execution, the operation of your petitioner's discharge and the Order thereof will be ineffective to properly protect him with the remedies provided for under the provision of the Bankruptcy Act, and your petitioner will be compelled to pursue a lengthy and expensive course of litigation and be put to great expense in obtaining the return to him of said

sum of approximately \$300.00 now in the hands of the present Sheriff of Napa County, namely, Joseph E. Moore, and the additional sums totaling the approximate sum of \$780.20, unlawfully recovered by said creditor as aforesaid;

Wherefor, your petitioner prays:

1. For an order directing and ordering said creditor, Peter Cassenos, and said Sheriff of Napa County, Joseph P. Moore, and each of them, to appear before the above entitled Court on a day and on a time certain to then and there show cause, if any they or either of them have, why said creditor, his agents, servants, assigns, employees and attorneys should not be forever enjoined and restrained from proceeding with any legal process to collect said judgment and from taking any proceedings, legal or otherwise, in connection therewith, and why such creditor should not turn over to your petitioner said sum of \$780.20, and why said Sheriff, Joseph P. Moore, should not be permanently restrained from paying over said approximate sum of \$300.00 to said creditor, and why he should not turn over said sum to your petitioner, and for such other and further relief as may be meet and proper in [23] the premises for which no previous application has been made, including costs and expenses, if any, for these proceedings;

2. For an order, temporarily enjoining and restraining said Sheriff, Joseph P. Moore, from turning over said approximate sum of \$300.00 to said creditor, and temporarily enjoining and restraining said creditor from proceeding with the enforce-

ment of said judgment until after the hearing of this petition and Order to Show Cause thereon, and the final determination thereof.

GEORGE J. BUZAS

Petitioner

MAX H. MARGOLIS

BRANTLEY W. DOBBINS

Attorneys for Petitioner [24]

United States of America,
Northern District of California,
County of Solano—ss.

George J. Buzas, being first duly sworn, deposes and says:

That he is the petitioner named and described in the foregoing petition; that he has read the petition and knows the contents thereof and hereby makes solemn oath that the statements contained therein are true to the best of his knowledge, information and belief.

GEORGE J. BUZAS

Subscribed and sworn to before me this 31st day of December, 1943.

BRANTLEY W. DOBBINS

Notary Public in and for the county of Solana,
State of California.

[Endorsed]: Filed Feb. 15, 1944. [25]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

Upon the reading, filing and consideration of the verified petition of George J. Buzas, the bankrupt above named, it therein appearing to be a proper case for the Orders following, and it further appearing that the bankrupt has duly and regularly obtained a discharge in the above entitled proceedings, and upon the consideration of all the records and papers of the file in said proceedings:

It Is Hereby Ordered that Peter Cassenos, Napa Road, Vallejo, California, in said District, the creditor named in said verified petition, do personally appear before the undersigned United States District Court Judge, at his Court- [26] room located in the United States Post Office and Courthouse Building, at Sacramento, California on Monday, the 20th day of March, 1944, at the hour of 10:30 o'clock A.M., of said day, or as soon thereafter as counsel may be heard, to then and there show cause, if any you have, why you the said Peter Cassenos, your agents, servants, assigns, employees and attorneys or either or any of them should not be forever restrained and enjoined from taking any proceedings, legal or otherwise for the purpose of collecting or enforcing the collection of any moneys allegedly due or claimed to be due from the Bankrupt herein on account of any claim or claims asserted by you against said Bankrupt, dischargeable in the above entitled proceedings; and why you

should not be ordered to turnover to said Bankrupt the sum of \$780.20 recovered by you upon a claim duly scheduled in Bankrupt's Schedules on file herein, after the commencement, pendency and conclusion of the above entitled Bankruptcy proceedings; and pending the hearing of said petition and the Order to Show Cause thereon, you, your agents, servants, assigns, employees and attorneys and each of them are enjoined and restrained from taking any proceedings, legal or otherwise, upon any of the matters set forth in said petition, until the final determination thereof and the further order of this Court; and

It Is Further Ordered, that Joseph P. Moore, Sheriff of the County of Napa, State of California, in said District, do personally appear before the undersigned, United States District Court Judge, at the place, on the day and at the time as hereinabove set forth, or as soon thereafter as counsel may be heard, to then and there show cause, if any you have, why the sum of \$300.00 or thereabouts, which as in said verified petition it is alleged you now have in your hands, should not be turned over to the petitioner herein; and you are further [27] ordered and directed to bring with you at the aforesaid time and place any and all books, records and documents which will show the levy of any writ or writs of execution in that certain action entitled "Peter Cassenos, Plaintiff v. George Buzas, Defendant" being No. 8341 of the files of the Clerk of the Clerk of the Superior Court of the State of California, in and for the County of Napa, show-

ing what disposition was made of any and all moneys received pursuant to the levy of said writ or writs of execution, the disposition of the same and what amount, if any, is now on hand; and

It Is Further Ordered that a copy of Bankrupt's said verified petition, together with a certified copy of this Order to Show Cause be served personally upon said creditor Peter Cassenos, and upon said Sheriff of Napa County, by delivering the same to them not later than ten (10) days prior to the aforesaid date of the hearing of the same.

Dated: Sacramento, California, in said district; February 15th, 1944.

MARTIN I. WELSH

United States District Judge

[Endorsed]: Filed Feb. 15, 1944. [28]

BANKRUPT'S EXHIBIT No. 1

In the Superior Court of the State of California,
in and for the County of Napa

No. 8374

PETER CASSENOS,

Plaintiff,

vs.

GEORGE BUZAS,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

That on November 16, 1940, and for a long time prior thereto plaintiff was entitled to the possession of and was in the actual possession of that certain real property situate in Napa Township, county of Napa, state of California, described as follows, to-wit:

Commencing at a point of the Spring Road where a fence divides the land of Charles Walsh from the land of Mini, thence running westerly along the northerly line of the Mini land at distance of approximately three hundred and sixty feet (360); thence northerly parallel to the Spring Road a distance of approximately thirteen hundred and sixty feet (1360) to the land of Margaret Walsh; thence easterly a distance of three hundred and sixty feet approximately (360) along the south line of the land of the late Margaret Walsh to the Spring Road; thence southerly along the west side of the Spring Road to the point of commencement. Containing twelve (12) acres, more or less.[29]

II.

That said lands and premises were on said 16th day of November, 1940, under cultivation and were planted by plaintiff to a crop of tomatoes which tomato crop was then and there growing upon said premises.

III.

That on said 16th day of November, 1940, the defendant forcibly and unlawfully entered in and upon said cultivated real property and drove a

truck over the growing vines and crop of tomatoes injuring and damaging the same in the sum of \$300.00.

IV.

That as a consequence of said forcible and unlawful entry and trespass of the defendant, plaintiff has been damaged in the sum of \$300.00, and is entitled to treble damages as a result thereof.

Wherefore plaintiff prays judgment against defendant for the sum of \$900.00 and costs of suit.

KING & KING

Attorneys for plaintiff. [30]

State of California,
County of Napa—ss.

Peter Cassenos, being first duly sworn, deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

PETER CASSENOS

Subscribed and sworn to before me this 6th day of December, 1940.

[Seal]

PERCY KING, JR.

Notary Public in and for the County of Napa,
State of California.

[Endorsed]: Filed Dec. 9, 1940. [31]

BANKRUPT'S EXHIBIT No. 2

In the Superior Court of the State of California
in and for the County of Napa

No. 8374

PETER CASSENOS,

Plaintiff,

vs.

GEORGE BUZAS,

Defendant.

EXECUTION

The People of the State of California

To the Sheriff of the County of Napa,

Greeting:

Whereas, on the 8th day of March, 1941, Peter Cassenos, Plaintiff, recovered a judgment in the said Superior Court of the County of Napa, State of California, against George Buzas, Defendant, for the sum of Nine hundred Dollars (\$900.00) with interest from March 8, 1941 at the rate of seven per cent per annum until paid, together with \$9.75 costs and disbursements at the date of said judgment, amounting to the sum of \$909.75 Dollars, and accruing costs as appears to us of record.

And Whereas, the Judgment roll in the action in which said Judgment was entered, is filed in the Clerk's office of said Court, in the County of Napa, and the said Judgment was docketed in said Clerk's office in said County on the day and year first above written.

And the sum of Nine hundred nine and 75/100

Dollars (\$909.75) with interest thereon, together with costs in the sum of.....and accrued costs in the sum of....., aggregating the sum of..... is now (at the date of this writ) actually due on this Judgment.

Now You, the Said Sheriff, are hereby required to make the said sums due on the said Judgment for damages, with interest as aforesaid and costs and accruing costs, to satisfy the said Judgment of Nine Hundred and nine and 75/100 Dollars out of the personal property of said Debtor George Buzas or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to George Buzas on the day whereon said Judgment was docketed in the said County, or and any time thereafter; and make return of this writ within 30 days after your receipt hereof, with what you have done endorsed thereon.

[32]

BANKRUPT'S EXHIBIT No. 3

Re: Peter Cassenos vs. George Buzas

INSTRUCTIONS TO SHERIFF

You are hereby instructed to levy on, seize and sell all of the following property of George Buzas located on the Charles Walsh farm on the Spring Road toward American Canyon about 7½ miles South of the City of Napa in Napa County, California, including crop of wheat, oats, tomatoes and one tractor.

Dated: September 8, 1942.

KING & KING

By PERCY KING, JR.

Attorneys for Plaintiff. [33]

BANKRUPT'S EXHIBIT No. 4

In the Superior Court of the State of California
in and for the County of Napa

No. 8374

PETER CASSENOS,

Plaintiff,

vs.

GEORGE BUZAS,

Defendant.

EXECUTION

The People of the State of California

To the Sheriff of the County of Napa,

Greeting:

Whereas, on the 22nd day of April, 1943, Peter Cassenos, Plaintiff, recovered a judgment in the said Superior Court of the County of Napa, State of California, against George Buzas, Defendant for the sum of Nine Hundred Dollars (\$900.00) with interest at the rate of 7 per cent per annum until paid, together with \$9.75 costs and disbursements at the date of said judgment, amounting to the sum of \$909.75 Dollars, and accruing costs as appears to us of record.

And Whereas, the Judgment roll in the action in which said Judgment was entered, is filed in the Clerk's office of said Court, in the County of Napa, and the said Judgment was docketed in said Clerk's office in said County on the day and year first above written.

And the sum of Nine hundred Dollars with interest thereon, together with costs in the sum of \$9.75, and accrued costs in the sum of....., aggregating the sum of.....is now (at the date of this writ) actually do on this Judgment.

Now You, the Said Sheriff, are hereby required to make the said sums due on the said Judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said Judgment of Nine hundred nine and 75/100 Dollars out of the personal property of said debtor or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to George Buzas on the day whereon said Judgment was docketed in the said County, or at any time thereafter; and make return of this writ within 60 days after your receipt hereof, with what you have done endorsed thereon. [34]

BANKRUPT'S EXHIBIT No. 5

Napa County Sheriff: Please sell according to the following notice.

PERCY KING, JR.

Attorney for Plaintiff

Sold 9-21-43, 10 A.M.—to Peter Cassenos for \$600.00.

In the Superior Court of the State of California,
in and for the County of Napa

No. 8374

PETER CASSENOS,

Plaintiff,

vs.

GEORGE BUZAS,

Defendant.

NOTICE OF SHERIFF'S SALE OF PERSONAL PROPERTY ON EXECUTION

Under and by virtue of an execution and order of sale issued out of the Superior Court of the County of Napa, state of California, and to me directed and delivered for a judgment rendered in said Court on the 22nd day of April, 1943, for the sum of \$900.00 in lawful money of the United States, together with the costs of suit and interest in favor of Peter Cassenos and against George Buzas, I have levied on all the right, title, claim and interest of said defendant of in and to the following property, to-wit:

Top Seat, Standard Model 30 Caterpillar Tractor Serial No. S-3769, and

127 sacks of wheat of net weight of approximately 16,530 lbs. [35]

Notice is Hereby Given, that I will sell all of the right, title and interest of said defendant, George Buzas, in and to the above described property or so much thereof as may be necessary to satisfy plaintiff's claim besides all costs, interest and accruing costs at public auction for cash in hand to the highest and best bidder, the sale of the above described tractor to take place at the warehouse of Berglund Tractor and Equipment Company at the northeast corner of First and McKinstry Streets, and on Tuesday the 21st day of September, 1943, at the hour of 10 o'clock A.M. of said day, and the sale of said wheat to take place at the warehouse of Napa Milling and Warehouse Company at Main and Fifth Streets, Napa, California, on Tuesday the 21st day of September, 1943, at the hour of 11 o'clock A.M. of said day, each of which sales are to be held in the city of Napa, County of Napa, state of California.

Dated, at Napa, California, this 13th day of September, 1943.

JOHN P. STECKTER,
Sheriff

By JOHN CLAUSSEN, JR.
Under Sheriff [36]

BANKRUPT'S EXHIBIT No. 6

R. E. Keig
Napa, California

September 21, 1943

M Sheriff of Napa County

To Napa Milling & Warehouse Co., Dr.

Main and Fifth Streets

Telephones 198 and 199

Wheat 12700# @2.60\$330.20

[37]

BANKRUPT'S EXHIBIT No. 7

In the Superior Court of the State of California
in and for the County of Napa

No. 8374

PETER CASSENOS,

Plaintiff,

vs.

GEORGE BUZAS,

Defendants.

SHERIFF'S CERTIFICATE OF SALE
ON EXECUTION

State of California,

County of Napa—ss.

I, John P. Steckter, Sheriff of the county of
Napa, state of California, do hereby certify that
under and by virtue of a writ of execution issued

out of the Superior Court of the state of California, in and for the county of Napa, in that certain action No. 8374 wherein Peter Cassenos, is plaintiff, and George Buzas, is defendant, upon a judgment dated the 8th day of March, 1941, did on this 1st day of October 1942, sell all of the crop of tomatoes now standing and growing on the Charles Walsh farm on the Spring Road toward American Canyon about 7½ miles south of the city of Napa, in the county of Napa, state of California, after due and legal notice at auction at the hour of 10 o'clock A.M. of this day, [38] at said premises within view of those who attended the sale to Peter Cassenos for the sum of \$150.00 cash in lawful money of the United States; that said sum of \$150.00 was the price bid for said personal property, was the whole price paid therefor, and was the highest and best bid for the same.

Given under my hand this 1st day of October, 1942.

.....

Sheriff of Napa County

By

Under-Sheriff

No.....

Oct. 1, 1942.

Received of Napa County Sheriff One hundred fifty & No/100 Dollars. Cassenos vs. Buzas, proceeds of sale of tomatoes.

\$150.00

PETER CASSENOS
By PERCY KING, JR.
His Attorney [39]

BANKRUPT'S EXHIBIT No. 8

In the Superior Court of the State of California,
in and for the County of Napa

No. 8374

PETER CASSENOS,

Plaintiff,

vs.

GEORGE BUZAS,

Defendants.

SHERIFF'S CERTIFICATE OF SALE
ON EXECUTION

State of California,
County of Napa—ss.

I, John P. Steckter, Sheriff of the county of Napa, state of California, do hereby certify that under and by virtue of a writ of execution issued out of the Superior Court of the state of California, in and for the county of Napa, in that certain action No. 8374 wherein Peter Cassenos is

plaintiff, and George Buzas, is defendant, upon a judgment dated the 22nd day of April, 1943, did on this 21st day of September, 1943, sell one top seat Model 30 Best Caterpillar Tractor Serial No. S-3769 after due and legal notice at auction at the hour of 10 o'clock A.M. of this day, at the warehouse of Berglund Tractor and Equipment Company, Napa, California, within view of those who attended the sale, to [40] Peter Cassenos for the sum of \$600.00 cash in lawful money of the United States; that said sum of \$600.00 was the price bid for said personal property, was the whole price paid therefore, and was the highest and best bid for the same.

Given under my hand this 21st day of September, 1943.

JOHN P. STECKTER

Sheriff of Napa County

By JOHN CLAUSSEN, JR.

Under-Sheriff

No.....

Sept. 21, 1943.

Received of Napa County Sheriff Six hundred and no/100 Dollars. Cassenos vs. Buzas, proceeds of sale of tractor.

\$600.00

PETER CASSENOS

By PERCY KING, JR.,

His Attorney [41]

BANKRUPT'S EXHIBIT No. 9

DISBURSEMENTS AND SHERIFF'S COSTS

		Debits
Sept. 24, 1942	Serving Execution on George Buzas.....	\$ 1.00
Sept. 24, 1942	Posting 3 notice of Sheriff's Sale.....	3.00
	Mileage on above: 12 miles @ .25.....	3.00
Oct. 1, 1942	Conducting Sheriff's Sale	1.00
	Mileage on above: 10 miles @ .25.....	2.50
	Hauling wheat and Tractor including stor- age on tractor up to and including Dec. 31, 1942	71.00
		<hr/> \$81.50

	Credits
April 28, 1943	By check from Percy King, Jr. \$81.50
	<hr/> \$81.50

Sept. 28, 1943	Storage on Tractor from Jan. 1 to Sept. 28, 1944, @ \$5.00 per month	45.00
Sept. 21, 1943	Sheriff's Costs—Posting Notices of Sale....	3.00
	Conducting sales	1.00
	Mileage: 5 @ .25	1.25
	Commissions 1%	10.80
		<hr/> \$61.05

Money Received by virtue of Writ of Execution:

Oct. 1, 1942—	
Sale of Tomato crop	\$ 150.00
Sept. 21, 1943—	
Sale of Tractor	600.00
Sept. 21, 1943—	
Sale of Grain	330.20
	<hr/> \$1080.20

Money Disbursed:

Oct. 1, 1942—	
Paid to Percy King	150.00 (on Tomato Sale)
Sept. 21, 1943—	
Paid to Percy King	600.00 (on Tractor Sale)

Sept. 28, 1943—

Paid to Berglund Tractor & Eqpt.

Co. (Storage) 45.00

Sept. 21, 1943—

Sheriff's Fees 16.05 (See above)

Balance on hand 269.15

 \$1080.20

[42]

 EXHIBIT "A"

In the Superior Court of the State of California,
in and for the County of Napa

No. 8374

PETER CASSENOS,

Plaintiff,

vs.

GEORGE BUZAS,

Defendant.

JUDGMENT

The above entitled action this day came on for trial before the Court without a jury, a jury having been expressly waived, the plaintiff appearing in person, and through his attorneys; no appearance was made by or on behalf of the defendant, proof was made to the satisfaction of the Court that the defendant was served personally with the summons herein, that he has failed to appear in this action within the time allowed by law and that the default of said defendant has been duly and regularly entered herein; oral and documentary

evidence was introduced, the cause was submitted to the Court for its decision and the Court now finds:

That all of the allegations of the complaint are sustained by the evidence and are true; that on November 16th, 1940, the defendant forcibly and unlawfully entered in and upon real property in the County of Napa cultivated by plaintiff [43] and drove a truck over the growing vines and crop of tomatoes of the plaintiff, damaging the same in the sum of \$300.00; that said defendant on said day did wilfully and maliciously injure the said property of the plaintiff and the plaintiff is entitled to treble damages as a result thereof.

It Is Therefore Ordered, Adjudged and Decreed, that plaintiff have and recover judgment against the defendant in the sum of \$900.00 for defendant's wilful and malicious injury to the property of plaintiff, plaintiff shall recover his costs of \$9.75.

Done in open Court this 22nd day of April, 1943.

MERVIN C. LERNHART

Judge of the Superior Court

The foregoing instrument is a correct copy of the original on file in this office.

Attest: April 5, 1944.

R. A. DOLLARHIDE

County Clerk and Clerk of the Superior Court and
for the County of Napa, State of California.

By D. D. DALY

Deputy

[Endorsed]: Filed April 22, 1943. [44]

In the Northern Division of the U. S. District Court
for the Northern District of California
Before Honorable Martin I. Welch.

No. 9490

In the Matter of
GEORGE J. BUZAS,
Bankrupt.

IN BANKRUPTCY

Hearing on return of Order to Show Cause why
legal proceedings should not be stayed, for tem-
porary restraining order to be made permanent
after hearing and for turnover order.

Appearances:

Max H. Margolis, Esq.,
Brantley W. Dobbins, Esq.,
For Bankrupt.

Percy King, Jr.
For Respondent. [45]

Thursday, April 6, 1944

JOHN CLAUSSEN, JR.

called as a witness on behalf of bankrupt, being first
duly sworn, testified as follows:

Mr. Margolis: Q. Mr. Claussen, what is your
business or occupation?

A. At the present time I am under sheriff of
Napa County.

(Testimony of John Claussen, Jr.)

Q. And what was your connection with the Sheriff's office in the years 1940 and '41?

A. Under sheriff.

Q. Did you bring any books or papers or documents in connection with any executions handled by the Sheriff of Napa County in the matter of Cassenos versus Buzas?

A. Yes, I did.

Q. May I see them, please? Can you, if you know inform me the first execution issued? You are more familiar with those, Mr. Claussen, than I am.

A. I believe that is the complaint (presenting document).

Q. Is this the original, or a copy?

A. The original, sir.

Q. That was issued by the Superior Court of Napa County on September 8, 1942?

A. Yes, sir.

Q. Was it returned partially satisfied or wholly unsatisfied, or what, Mr. Claussen?

A. It has not been returned.

Q. It was never returned, is that correct?

A. No, sir, they declared this execution to be void.

Q. Who declared it to be void, Mr. Claussen?

A. I believe it was the judge of the Superior Court, Harold Jacoby.

Q. And that was never returned to the Clerk's office?

A. That is right.

Q. Was there an execution levied?

A. Yes, sir.

(Testimony of John Claussen, Jr.)

Q. Have you that execution?

A. Yes, sir. [47]

Q. May I see it, please, and I will also have the first one, please.

A. Yes, sir (present documents).

Q. This was issued out of the Superior Court by the Clerk on April 2, 1943?

A. Yes, sir, the last one. The first execution was issued on September 8, 1942.

Q. Now, have you a copy or the original instructions which went with both of these executions? A. Yes, sir.

Q. May I have them, please?

A. That is the first one, and here is the instruction on the second one (presenting documents).

Q. What happened to the proceeds of the sale under these executions, Mr. Claussen?

A. Well, I have an accounting here. Do you want me to state the amounts of money received?

Q. That is correct, and what disposition was made of them.

A. On October 1, 1942, the crop of tomatoes was sold for \$150.00. That was sold to Mr. Cassenos—pardon me, to Mr. King, Percy King, Jr.

Q. The crop was sold to Mr. King?

A. At public auction, yes.

Q. He bought them in for \$150.00?

A. Yes, sir.

Q. On October 1, 1942, did you say?

A. Yes, sir. On September 21, 1943, the tractor was sold for \$600.00.

(Testimony of John Claussen, Jr.)

Q. To whom?

A. To Mr. Peter Cassenos, that is the plaintiff, he was the highest bidder.

Q. Were there any other bids received?

A. Yes, sir.

Q. Do you have them there?

A. No, they were sold at public auction.

Q. Who conducted the sale? A. I did.

Q. Do you know what the next highest bid to \$600.00 was? [48]

A. I think the other highest was \$550.00 by a gentleman who is in the contracting business in Napa.

Q. Was there anything else, any other property sold?

A. Yes, sir, there was some grain sold for \$330.20.

Q. When did that sale take place?

A. On September 21, 1943.

Q. What was the date of the issuance on this second writ? A. April 22, 1943.

Q. And the sale was pursuant to that writ and did not take place until September 21, 1943?

A. That is correct.

Q. And that writ was never filed, never been returned to the clerk's office? A. It has not.

Q. Now, what disposition was made of the \$330.20?

A. I had to pay \$61.05 costs. There was storage due on the tractor from January 1 until September 28, 1943, at the rate of \$5.00 a month, which

(Testimony of John Claussen, Jr.)

would be \$45.00, and then our costs and commissions were \$16.05, including the posting of the notices of Sheriff's sale and conducting sale, and mileage.

Q. Yes?

A. And there was \$61.05 came out of that \$330.20, leaving a balance of \$269.15, which we still have in our possession.

Q. \$269.15? A. That is correct.

Q. You had that in your possession since September '43?

A. September 21, 1943, yes sir.

Q. Is there any reason why—I will withdraw that.

Can you tell us why you are holding that \$269.15, Mr. Claussen?

A. Yes, I was holding it at Mr. King's instructions.

Q. And that is the only reason?

A. That is the only reason, yes, sir.

Q. There are no other expenses due to your office out of that [49] \$269.15?

A. No, sir, that is all the money we have on hand. There were other costs involved in September of 1942 when we served the execution and attached the tractor.

Q. Did you receive \$150.00 for the sale of that wheat?

A. Yes, I did—Oh, for the sale of the tomatoes, you mean?

Q. The sale of the tomatoes, pardon me.

A. Yes, sir.

(Testimony of John Claussen, Jr.)

Q. Do you have the card or any other information that would show that and what disposition was made of the \$150.00?

A. I turned that over to Mr. King.

Q. Mr. King? A. Yes, sir.

Q. Does he have them with him now, do you know?

A. Just a minute, I have the record here, the receipt and everything. (Documents presented to counsel.)

Q. Do I understand, then, Mr. Claussen, that Mr. King purchased these tomatoes from the Sheriff for \$150.00 and paid the Sheriff \$150.00 and in turn the Sheriff turned over the entire \$150.00——

A. To Mr. King.

Q. ——to Mr. King for judgment of creditors?

A. That is right.

Q. Were there any expenses due to the Sheriff's office for the sale at that time?

A. Yes, sir. Let's see, what is the date of that, sir?

Q. October 1, 1942.

A. Yes, we had the serving of the execution and posting three notices of the Sheriff's sale, and mileage, at that time.

Q. And that wasn't withdrawn from the \$150.00?

A. No, sir, because the case was not complete.

Q. But notwithstanding, you turned the \$150.00 over to Mr. King? A. Yes, sir.

Q. Does Mr. King run an open account with the Sheriff's office [50] of Napa County?

(Testimony of John Claussen, Jr.)

A. An open account— oh yes, we don't ask advances of funds from any local lawyers.

Q. I see. Any matter that comes from his office, you just handle it without advance of funds?

A. Yes, sir, that is right.

Q. Do you have any funds coming out of the \$269.15, Mr. Claussen?

A. No, sir. You see, sir, on September 24 there was a one dollar charge for serving the execution on Mr. Buzas.

Q. Of what year?

A. 1942. And there was a posting of three notices of Sheriff's sale, which amounted to \$3.00 and the mileage was \$3.00, there was twelve miles at 25 cents per mile. Then there was on October 1, conducting the sale, \$1.00 and mileage, ten miles at 25 cents a mile, \$2.50. Then the tractor and wheat were hauled and stored at the Napa Milling Company in Napa, and I don't know exactly what there were on that, but up to September 30, 1943, their storage and hauling charges were \$71.00, and on April 28, 1943, Mr. King paid \$81.50 covering all the expenditures that I have just itemized to you.

Q. That was separate and apart from the \$269.15?

A. That is right, that was in 1942, and there was no further action taken until September 28, 1943, and then the other expenditures for nine months' storage on the tractor, plus the posting of notices for Sheriff's sale and conducting the

(Testimony of John Claussen, Jr.)

Sheriff's sale, and mileage, that was another expense that occurred on September 21, 1943, and that amounted to \$61.05.

Q. The items you have just given?

A. Yes, sir.

Q. The \$81.00 that you spoke of, do you know in what fashion that was received in the Sheriff's office?

A. I was paid by check April 21, 1943, by Mr. King. [51]

Q. Mr. King's personal check, of his office check?

A. I wouldn't be able to state.

Q. It was by check?

A. Yes, sir.

Q. Can you tell us why you are holding up the \$269.15 from the 21st of September, 1943, and you still hold it?

A. Only under Mr. King's instructions; I asked him if he wanted me to make a return.

Q. Were they written instructions?

A. No, sir, just verbal.

Q. Can you tell us why the original execution is still in the file and has not yet been returned to the Clerk's office of Napa County?

A. Because Mr. King told me to hold it.

Mr. Margolis: We will offer in evidence, may it please your Honor, the original execution in action, Peter Cassenos versus George Buzas, being No. 8374 out of the Superior Court of the State of California, County of Napa, dated September 8, 1942; another original execution of sale, dated April 22, 1943. The instructions of September 8, 1942,

(Testimony of John Claussen, Jr.)

which accompanied the earlier writ, and the instructions dated the 13th day of September, 1943,— I will withdraw that for a moment.

Q. Were there any instructions which you received on that date with the writ of April, 1943?

A. Mr. King told me to follow the instructions contained on the first one.

Q. Told you over the phone, or in person?

A. In person, he presented it to me in person.

Mr. Margolis: I will renew my offer of the exhibits already mentioned, and also the one dated the 13th day of September, 1943, that is the notice of sale, it has the instructions on the top with the instructions written in ink directed to Napa County Sheriff and reading: [52]

“Please sell according to the following notice. Signed Percy King, Jr., Attorney for Plaintiff.”

We will offer these four exhibits in evidence and respectfully ask that they be received.

Mr. King: Might I interpose an objection at this time on the ground that the proposed exhibits are irrelevant and immaterial, and that they deal with a matter that this Court has no jurisdiction over, a matter that has been settled in the Superior Court of the State of California.

The Court: Overruled. They may be admitted.

(The documents referred to were received in evidence and marked Bankrupt's Exhibits Nos. 2, 3, 4, and 5, respectively.)

(Exhibits Nos. 2, 3, 4, and 5 printed out in full at pages 32 to 36.)

(Testimony of John Claussen, Jr.)

Mr. Margolis: Q. Now, have you any further additional documents in your file, pertaining to the inquiry here, Mr. Claussen?

A. Yes, sir, I have a receipt from Mr. King. (Document handed to counsel.)

Q. You received the \$600.00 evidenced by this receipt of September 21, 1943?

A. Yes, sir.

Q. It was paid to Mr. King?

A. Yes, sir.

Q. It was purchased by Mr. Cassenos?

A. Yes, sir.

Q. He paid \$600.00 for it in cash?

A. Yes, sir.

Q. You turned the \$600.00 over to Mr. King?

A. Yes, sir.

Q. Is there anything else in your file pertaining to the matter?

A. I have a receipt here from the Napa Milling Company for \$330.20, which we received for sale of wheat.

Q. Is there anything else in your file respecting this matter?

A. You mean in regarding to this sale?

Q. This sale, yes. Do you have any letters from Mr. Cassenos the judgment creditor here? [53]

A. No, sir, I never had any dealings with Mr. Cassenos.

Q. I see. Do you have anything else from Mr. King?

A. No, sir, I don't. I have here the order—certified copy of the order vacating judgment.

Q. Do you have a recapitulation of the money

(Testimony of John Claussen, Jr.)

you received, the money you disbursed and to whom paid on that matter? -

A. Yes, sir, I do. (Document presented to counsel.)

Mr. Margolis: We now respectfully present to your Honor these documents to be marked as exhibits.

Q. This, you say, is a receipt from the Napa Milling Company?

A. Yes, sir, that is what they gave me.

Mr. Margolis: A document showing that wheat, 12,700 pounds at \$2.60, a total sum of \$330.20, sold to the Napa Milling and Warehouse Company. We ask that be marked next in order.

Mr. King: Might I, for the purpose of the record, your Honor, make the same objection as I made to the introduction of the first documents, and might my objection be deemed to go to all of these documents?

The Court: It may be admitted.

(The document referred to was received in evidence and marked Bankrupt's Exhibit No. 6.)

(Exhibit No. 6 printed out in full at page 38.)

Mr. Margolis: The receipt dated October 1, 1942, for \$150.00, accompanied by a copy, a copy of Sheriff's sale on execution.

The Court: It may be admitted.

(The document referred to was received in

(Testimony of John Claussen, Jr.)

evidence and marked Bankrupt's Exhibit No. 7.)

(Exhibit No. 7 printed out in full on page 38.)

Mr. Margolis: A receipt dated September 21, 1943, for \$600.00, accompanying a copy of Sheriff's sale on execution.

The Court: It may be admitted. [54]

(The document referred to was received in evidence and marked Bankrupt's Exhibit No. 8.)

(Exhibit No. 8 printed out in full at page 40.)

Mr. Margolis: And a recapitulation of money received by the Sheriff's office and the disbursement of it.

The Court: Admitted.

(The document referred to was received in evidence and marked Bankrupt's Exhibit No. 9.)

(Exhibit No. 9 printed out in full at page 42.)

Mr. Margolis: Q. How long have you been connected with the Sheriff's office in your present capacity, Mr. Claussen?

A. A little over four years.

Q. And prior to that were you in any other capacity in the Sheriff's office?

A. No, sir, I was with the Napa Police Department.

(Testimony of John Claussen, Jr.)

Q. And in your capacity as under Sheriff of Napa County, how long do you hold a writ in your office before you execute it?

Mr. King: Now, I will object to that, your Honor, on the ground that it is incompetent, irrelevant and immaterial, and not in the issue of this case; it might do in other cases.

The Court: Objection sustained.

Mr. Margolis: Q. Do you know, in your duties as under sheriff of Napa County, how long you are able to hold a writ in your office before you return it to the Clerk's office?

Mr. King: Same objection, your Honor, irrelevant, immaterial.

The Court: Sustained.

Mr. Margolis: I think it is appropriate. I have in mind this: that as I understand the law, when an execution is issued it must be returned to the Sheriff within sixty days, and I am trying to ascertain that, and that is the reason I asked the witness if he had any other correspondence or papers in connection with this matter. We have a writ here almost nine months old, reposing in the files of the Sheriff's office.

The Court: The Court withdraws its ruling. You may answer.

Mr. Margolis: May I reframe the question, your Honor?

The Court: Yes.

Mr. Margolis: Q. Usually, when a writ of ex-

(Testimony of John Claussen, Jr.)

execution is delivered to the Sheriff's office, how long are you required to retain it before you return it to the Clerk's office, whether satisfied or unsatisfied?

Mr. King: Object, your Honor; incompetent, irrelevant and immaterial, and not within the issues of this case; and secondly a legal conclusion of the witness.

The Court: Overruled.

A. Most executions state the time that they are to be returned. We receive some in our office that are to be returned in ten days, some thirty days, some sixty days.

Mr. Margolis: Q. And you are quite familiar that the longest that a writ can repose in your office is sixty days, after which you must return it to the Clerk's office; isn't that correct?

A. I believe you are correct.

Mr. Margolis: That is all.

Cross Examination

Mr. King: Q. As a matter of fact, you are holding this \$265.00, or \$269.00 in your office in the form of a warrant under a court order?

Mr. Margolis: We object to that as being incompetent, irrelevant and immaterial in what form it is being held. The fact of the matter is, it is in the Sheriff's hands at this time.

The Court: Objection sustained.

Mr. King: Q. Isn't it true that that fund that you hold [56] there was available to me at any time that I would call for it?

(Testimony of John Claussen, Jr.)

Mr. Margolis: I object to the question for reasons heretofore stated, your Honor.

The Court: Same ruling.

Mr. King: That is all. No further questions.

Mr. Margolis: That is our case, your Honor.

Mr. King: We rest, your Honor.

The Court: You may submit the matter on briefs and transcript of the testimony.

[Endorsed]: Filed Dec. 8, 1944. [57]

[Title of District Court and Cause.]

To Brantley W. Dobbins, 520 Marin St., Vallejo, Calif.

King & King, Behlow Bldg., Napa, Calif.

NOTICE

You Are Hereby Notified that on Thursday, October, 19th, 1944 Judge Martin I. Welsh Ordered that the petition to restrain the enforcement and collection of the judgment be and the same is hereby Denied, that the temporary restraining order be and the same is hereby Dissolved, and that the petitioner's application for an order to turn over certain money be and the same is hereby Denied. In Accordance with Opinion filed herein.

Sacramento, California, October 20, 1944.

C. W. CALBREATH

Clerk, U. S. District Court

[58]

In the United States District Court for the Northern District of California, Northern Division.

No. 9490

In the Matter of

GEORGE J. BUZAS,

Bankrupt.

OPINION

Petitioner, George J. Buzas, brings this proceeding to restrain the collection of a judgment for \$900 and costs recovered against him in the Superior Court of the State of California, in and for the County of Napa, by the respondent, Peter Cassenos and for a turnover order with respect to moneys already collected by execution of said judgment. Respondent's state court action was pending against petitioner when he filed his petition in bankruptcy herein. Judgment by default was recovered in that action by the respondent after petitioner received his final discharge in bankruptcy.

Petitioner contends that the claim of the respondent, duly listed in the schedule of debts of the petitioner accompanying his bankruptcy petition, was discharged by the decree of final discharge of this court. [59]

The respondent disputes the jurisdiction of this court, in this bankruptcy proceeding, to hear petitioner's application for relief from the enforcement of the judgment of the state court. If jurisdiction be present in this court to entertain the application, then—asserts the respondent—the petitioner must

be denied the relief he seeks because his liability to respondent upon which the state court judgment is based is one for willful and malicious injury to property and, consequently, is not discharged in bankruptcy.

Bankruptcy Act, Section 17(2)

I am satisfied with the jurisdiction of this court in bankruptcy to determine in this proceeding the effect of the decree of final discharge entered herein upon the liability of the bankrupt to respondent, existing when this proceeding was instituted, and which was listed among the unsecured debts of the bankrupt in his schedule of liabilities filed herein; and to grant or deny the relief sought against the enforcement of that liability, according to the conclusion here reached as to the effect on such liability of petitioner's final discharge in bankruptcy.

Local Loan Co. v. Hunt, 292 U. S. 234;
Holmes v. Rowe 97 Fed. 2d, 537.

At the time of the filing of the petition in bankruptcy herein, respondent's suit was pending in the state court. The complaint in that action (Bankrupt's Exhibit No. 1) alleged that the petitioner—

“ * * * forcibly and unlawfully entered in and upon said (respondent's) cultivated real property and drove a truck over the growing vines and crop of tomatoes injuring and damaging the same in the sum of \$300.00.”

The prayer of the complaint asked for treble damages and costs.

By the default judgment entered subsequent to

[60] the final discharge of petitioner, the state court found that all of the allegations of the complaint were true; that the forcible entry of petitioner upon the property of respondent was willful and malicious, and awarded judgment to respondent in treble the amount of actual damage sustained.

The petitioner complains that at no time prior to the entry of judgment against him in the state court was respondent's claim based on any asserted willful or malicious injury to property; that at all times up to the entry of that default judgment, which occurred after petitioner was granted his final discharge, respondent's claim against him was one for simple trespass upon and injury to property, unaccompanied by any willfulness or malice. With this contention, I cannot agree. The forcible entry upon the property of another and the driving of a truck over the latter's growing vines and tomatoes—and these were the charges of respondent in his complaint filed against the petitioner—imputes to the doer of the acts a course of conduct pursued not as the result of mere inadvertence or carelessness. The doing of these acts imports a state of mind accompanying them which is both willful and malicious. In *San Francisco etc. Soc. v. Leonard*, 17 Cal. App. 254, which was an action for damages for forcible entry and detainer of real property, the court stated at page 269:

“It was not necessary, in our opinion, for the plaintiff to plead more than the alleged forcible detainer to entitle it to prove facts which would

have justified the court in awarding exemplary or punitive damages. The charge of forcible detainer of real property necessarily carries with it the implication that such detainer is from a bad motive, and what the precise nature of that motive is—whether it be founded in malice or fraud or oppression of any sort—may properly be shown under the general averment that the detainer is forcible.” [61]

Moreover, from the fact that treble damages were requested by respondent in his complaint filed against petitioner in the state court, it is evident that ever since suit was instituted by respondent on his claim—and it must be remembered that this suit was pending when petitioner filed his application in bankruptcy—that claim was **predicated upon a willful and malicious wrong**. For to the extent that damages are sought for a forcible entry upon property, in the California state court, in excess of the actual pecuniary loss thereby sustained, they are not based upon any claimed right to compensatory relief. Their objectives are punitive and exemplary and they are allowed only in cases of wrongful acts done deliberately and unconscionably. In speaking of the power of the state court to award treble damages in cases of forcible or unlawful entry or detainer upon real property, the court in the case of *San Francisco etc. Soc. v. Leonard*, *supra*, stated at page 271:

“That the power thus specially given the court was intended to be exercised in those cases

only where the evidence discloses that the defendant has committed the tortious act charged against him wantonly or by oppression or with malice, express or implied, is a proposition which, in our opinion is rendered free from any kind of doubt, if not alone by the language of Section 1174 of the Code of Civil Procedure, then most surely by that of Section 735 of the same code."

It is my conclusion that the allegation of respondent's complaint that petitioner forcibly entered upon his property and damaged his growing crops, and his request for the imposition of treble damages for such acts, is the equivalent of a charge of willful and malicious injury to respondent's property, a liability not subject to discharge in bankruptcy. The record of the proceedings in the state court do not support petitioner's contention that a dischargeable [62] claim was converted by the judgment entered subsequent to petitioner's discharge in bankruptcy into an undischageable debt for the purpose of avoiding the effect of the discharge. The judgment awarding respondent treble damages for a willful and malicious injury to property was fully supported by the allegations of the complaint upon which it was based; and it has not been rendered ineffective because of the decree of final discharge granted to petitioner.

It Is Therefore Ordered, that the petition of George J. Buzas to restrain the enforcement and collection by execution of the judgment of the

Superior Court of the State of California in and for the County of Napa in the action entitled Peter Cassenos, Plaintiff, v. George Buzas, Defendant, and numbered 8374, be and the same is Denied; that the temporary restraining order heretofore issued by this court against the enforcement of such judgment be and the same is Dissolved; and that petitioner's application for an order directing respondent to turn over to petitioner the amount heretofore collected by him on said judgment is Denied.

Dated: October 18, 1944.

MARTIN I. WELSH

United States District Judge.

[Endorsed]: Filed Oct. 19, 1944. [63]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that George J. Buzas, the above named Bankrupt, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain Order and Judgment made and entered in the above entitled proceedings by the Honorable Martin I. Welsh, Judge of the above entitled Court, on the 20th day of October, 1944, denying Bankrupt's petition to restrain the enforcement and collection of a certain judgment and [64] dissolving the temporary restraining

order, and denying Bankrupt's application for a turnover order.

Dated: November 28th, 1944.

GEORGE BUZAS

By MAX H. MARGOLIS

HERBERT CHAMBERLIN

BRANTLEY W. DIBBONS

His Attorneys

[Endorsed]: Filed Nov. 29, 1944. [65]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents, that Max H. Margolis, one of the attorneys for George J. Buzas, as Depositor for the purpose of making, guaranteeing or becoming surety upon bonds or undertaking required or authorized by the laws of the United States of America, is held and firmly bound unto Peter Cassenos and to Joseph P. Moore, Sheriff of Napa, State of California, in said District, and unto his successors in such offices in the penal sum of \$250.00 which said sum is represented by the attached Cashier's check in the sum of \$250.00 dated November 28, 1944 [66] being No. 952590 drawn by the Anglo California National Bank of San Francisco in favor of C. W. Calbreath, Clerk, United States District Court, well and truly to be made unto the said appellees or their said successors and personally represents respectfully.

The condition of the foregoing obligation and undertaking is such, that whereas the above named Bankrupt, George J. Buzas, has appealed and is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order and Judgment made and entered in the above entitled Court and Cause, on the 20th day of October, 1944, denying Bankrupt's petition to restrain the enforcement and collection of a certain judgment and dissolving the temporary restraining order, and denying Bankrupt's application for a turnover order;

Now, Therefore, if the said George J. Buzas, Bankrupt, shall prosecute his said appeal to effect and answer all costs which may be awarded or adjudged against him, if he fails to make good his said appeal, then this obligation shall be void; otherwise to remain in full force and effect, and in case of any breach of said condition, it is expressly agreed that the said District Court may, upon notice to said George J. Buzas, of not less than ten (10) days proceed summarily in the above entitled suit to ascertain the amount which he is bound to pay on account of such breach and render judgment against him therefor and award execution on the proceeds of said cashier's check.

In Witness Whereof, these presents have been executed by Max H. Margolis, as Depositor for said George J. Buzas.

November 28th, 1944.

MAX H. MARGOLIS

Depositor. [67]

State of California,

City and County of San Francisco—ss.

On the 28th day of November, 1944, before me, Louis Wiener, a Notary Public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Max H. Margolis, as Depositor, for George J. Buzas known to me to be the person who executed the within instrument, and acknowledged to me that he executed the within instrument, and acknowledged to me that he executed the same, and also known to me to be the person whose name is subscribed to the within instrument and he acknowledged to me that he subscribed his name as Depositor for the said George J. Buzas.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the date and year first above written.

LOUIS WIENER

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Nov. 29, 1944. [68]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75 (a)

To the Above Entitled Court and to C. W. Calbreath, Esq., Clerk of Said Court, and to Peter Cassenos and Joseph P. Moore, Sheriff of the County of Napa, State of California, Respondents, and to Messrs. King and King, Their Attorneys:

Comes now George J. Buzas, the Appellant herein, and, in accordance with Rule 75(a) of the Federal Rules of Civil Procedure designates the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said Appeal was heretofore filed herein on November 29th, [69] 1944, viz:

1. Debtor's Petition.
2. Order of Adjudication.
3. Statement of Affairs.
4. Schedules of Bankrupt.
5. Discharge of Bankrupt dated November 18, 1941.
6. Petition for Order to Show Cause why Legal Proceedings should not be Stayed, for Temporary Restraining Order to be Made Permanent after Hearing, and for Turnover Order.
7. Order to Show Cause and Temporary Restraining Order.
8. Petitioner's Exhibit No. 1, the Complaint filed in the Superior Court of the State of California, in and for the County of Napa, entitled Peter Cas-

senos, Plaintiff, v. George Buzas, Defendant, being No. 8374.

9. Petitioner's Exhibit No. 2, Writ of Execution in said action dated September 8, 1942.

10. Petitioner's Exhibit No. 3, Instructions accompanying said Writ of Execution dated September 8, 1942.

11. Petitioner's Exhibit No. 4, Writ of Execution in said action dated April 22, 1943, together with notation thereon "fully satisfied—not yet filed" dated September 25, 1943.

12. Petitioner's Exhibit No. 5, Notice of Sheriff's Sale of Property on Execution, dated September 13, 1943 and accompanying Instructions.

13. Petitioner's Exhibit No. 6, Sale to Napa Milling and Warehouse Company, "Wheat for \$330.20".

14. Petitioner's Exhibit No. 7, Receipt dated October 1, 1942, for \$150.00 signed by Percy King for Peter Cassenos and accompanying Sheriff's Certificate of Sale on Execution.

15. Petitioner's Exhibit No. 8, Receipt dated September 21, 1943, in the sum of \$600.00 showing receipt by Percy King for Peter Cassenos. [70]

16. Petitioner's Exhibit No. 9, Recapitulation of Receipts and Disbursements of Sheriff in the sum of \$1080.20.

17. Respondent's Exhibit "A", the Judgment in said action, No. 8374, dated the 22nd day of April, 1943.

18. Transcript of Testimony on the hearing of the Order to Show Cause held on April 6, 1944.

19. Notice of C. W. Calbreath, Clerk, United States District Court, dated October 20, 1944.

20. Opinion of Honorable Martin I. Welsh, United States District Judge, dated October 18, 1944, and filed October 19, 1944.

21. (Appellant) Notice of Appeal dated November 28, 1944.

22. (Appellant) Cost Bond on Appeal.

23. This Designation of Contents of Record on Appeal.

Dated: December 7th, 1944.

Respectfully submitted,

MAX H. MARGOLIS

HERBERT CHAMBERLIN

BRANTLEY W. DOBBINS

By MAX H. MARGOLIS

Attorneys for Appellant

George J. Buzas

[Endorsed]: Filed Dec. 8, 1944. [71]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 71 pages, numbered from 1 to 71, inclusive, contain a full, true and correct transcript of certain records and proceedings in the Matter of George J. Buzas, Bankrupt No. 9490, as the same now remain on file and

of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Contents of Record on Appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Fifteen and 45/100 (15.45) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 26th day of February, A.D. 1945.

[Seal] C. W. CALBREATH,
Clerk

By F. M. LAMPERT
Deputy Clerk [72]

[Endorsed]: No. 10991. United States Circuit Court of Appeals for the Ninth Circuit. George J. Buzas, Appellant, vs. Peter Cassenos and Joseph P. Moore, Sheriff of the County of Napa, State of California, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed February 28, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10991

GEORGE J. BUZAS,

Appellant,

vs.

PETER CASSENOS and JOSEPH P. MOORE,
as SHERIFF OF NAPA COUNTY, STATE
OF CALIFORNIA,

Appellees.

DESIGNATION OF PARTS OF RECORD NE-
CESSARY FOR THE CONSIDERATION
OF APPEAL UNDER RULE 19 (6)

Comes now the above-named Appellant and hereby designates, as the parts of the record which he deems necessary for the consideration of the above appeal of all the record as contained in the designation of the contents of the Record on Appeal heretofore transmitted to the Clerk of the above-entitled Court by the Clerk of the United States District Court for the Northern District of California.

Dated: February 28, 1945.

MAX H. MARGOLIS

HERBERT CHAMBERLIN

BRANTLEY W. DOBBINS

By MAX H. MARGOLIS

Attorneys for Appellant

George J. Buzas.

[Endorsed]: Filed February 28, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANT ON AP-
PEAL UNDER RULE 19 (6)

Comes now George J. Buzas, Appellant herein, and in accordance with Rule 19 (6) of the above entitled Court, specifies the following as a concise statement of the points on which Appellant intends to rely on the Appeal heretofore perfected from the Order made and entered by Hon. Martin I. Welsh, Judge of the United States District Court for the Northern District of California, on the 18th day of October, 1944, and more particularly specified and described in the Notice heretofore filed with the Clerk of said District Court on November 29, 1944, as follows:

That that certain Order of the District Judge entered on the 18th day of October, 1944, by which he denied the petition of Appellant for an Order enjoining and restraining Appellee, Peter Cassenos, his agent, servants, assigns, employees and attorneys from proceeding with any legal process to collect a judgment, taken by default after Appellant's discharge, and from taking any legal proceedings, legal or otherwise in connection with said judgment, and by which said District Judge dissolved a temporary restraining order, theretofore issued, against the enforcement of said judgment, and by which said District Judge denied Appellant's application for an order directing Appellees, Peter Cassenos and Joseph P. Moore, Sheriff of Napa County, State of

California, to turn over to Appellant the respective amounts collected by them on said judgment, was and is erroneous and contrary to law, in that,

1. That said Order herein appealed from is not supported by and is contrary to the evidence adduced by Appellant and by Appellees upon the hearing of Appellant's petition to stay legal proceedings, for a temporary restraining order to be made permanent and for a turnover order.

2. That said Order herein appealed from is not supported by and is contrary to the evidence in that it affirmatively appears that long after Appellant's discharge, Appellee, Peter Cassenos, procured a default judgment against Appellant on a claim for damages, which said claim was discharged upon the granting of Appellant's discharge.

3. That it affirmatively appears from the evidence adduced upon said hearing of Appellant's said petition that at no time up to and including his discharge was he apprised of or had any notice of any charge of willful or malicious acts, the basis of the claim of Appellee, Peter Cassenos, being one for damages only.

4. That the evidence adduced upon said hearing of Appellant's said petition and contrary to the finding by said District Judge of imputed willful or malicious conduct on the part of Appellant, affirmatively demonstrates that Appellee, Peter Cassenos, did not sustain the burden of proving the claim was not dischargeable.

5. That the evidence adduced upon said hearing

of Appellant's said petition affirmatively shows the sum of \$269.15 was in the hands of Appellee, Joseph P. Moore, Sheriff of Napa County, State of California, on the date of said hearing, which sum was recovered by said Appellee pursuant to a writ of execution issued out of the Superior Court of Napa County, State of California, on said judgment, and that the Order of said District Judge herein appealed from makes no disposition of said sum of \$269.15.

6. That the evidence adduced upon said hearing of Appellant's said petition affirmatively shows that two original writs of execution were issued, neither of which at the time of the hearing of Appellant's said petition, were returned and that the second was not levied until more than five months after its issuance.

7. That it does not appear from the evidence that the claim of said Appellee, Peter Cassenos, is not dischargeable.

8. That the evidence adduced upon said hearing of Appellant's said petition, and from the allegations contained therein, no answer thereto having been filed, affirmatively demonstrates that the claim in controversy arose out of a lease by Appellant to Appellee, Peter Cassenos, of a parcel of land for a term of approximately one year, the rent for which was the total sum of \$70.00, the embarrassment, harassment and unwarranted annoyance by the levy of two writs of execution and the unsatisfied condition of the judgment on said claim, all add up to such

“unusual circumstances” which warrant the relief sought by Appellant in his petition.

Dated: March 6th, 1945.

MAX H. MARGOLIS

HERBERT CHAMBERLIN

BRANTLEY W. DOBBINS

By MAX H. MARGOLIS

Attorneys for Appellant

George J. Buzas

[Endorsed]: Filed March 6, 1945. Paul P. O'Brien, Clerk.

No. 10,991

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE J. BUZAS,

Appellant,

VS.

PETER CASSENOS and JOSEPH P. MOORE,
Sheriff of the County of Napa, State
of California,

Appellees.

APPELLANT'S OPENING BRIEF:

MAX H. MARGOLIS,

HERBERT CHAMBERLIN,

Russ Building, San Francisco,

BRANTLEY W. DOBBINS,

520 Marin Street, Vallejo,

Attorneys for Appellant.

FILED

MAY 11 1945

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Statement of Jurisdiction	1
Statement of the Case	2
Specification of Errors	5
Argument of the Case	6
Summary of argument	6
1. Specification of Error No. 1. The District Court erred in finding that the claim of appellee Cassenos was one for a willful and malicious injury to property, for the reason that the evidence established the contrary as a matter of law	7
2. Specification of Error No. 2. The District Court erred in finding that the discharge in bankruptcy did not constitute a bar to the claim of appellee Cassenos, for the reason that the evidence established the contrary as a matter of law	11
3. Specification of Error No. 3. The District Court erred in denying the petition to enjoin enforcement of the claim of appellee Cassenos, for the reason that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim.....	13
4. Specification of Error No. 4. The District Court erred in dissolving the temporary restraining order, for the reason that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim of appellee Cassenos	14
5. Specification of Error No. 5. The District Court erred in denying a turnover order against the appellee Cassenos, for the reason that the evidence established as a matter of law that said appellee had received the sum of \$750 by enforcing a claim from which appellant had been released by a discharge in bankruptcy.....	15
6. Speculation of Error No. 6. The District Court erred in denying a turnover order against the appellee Moore, for the reason that the evidence established as a matter	

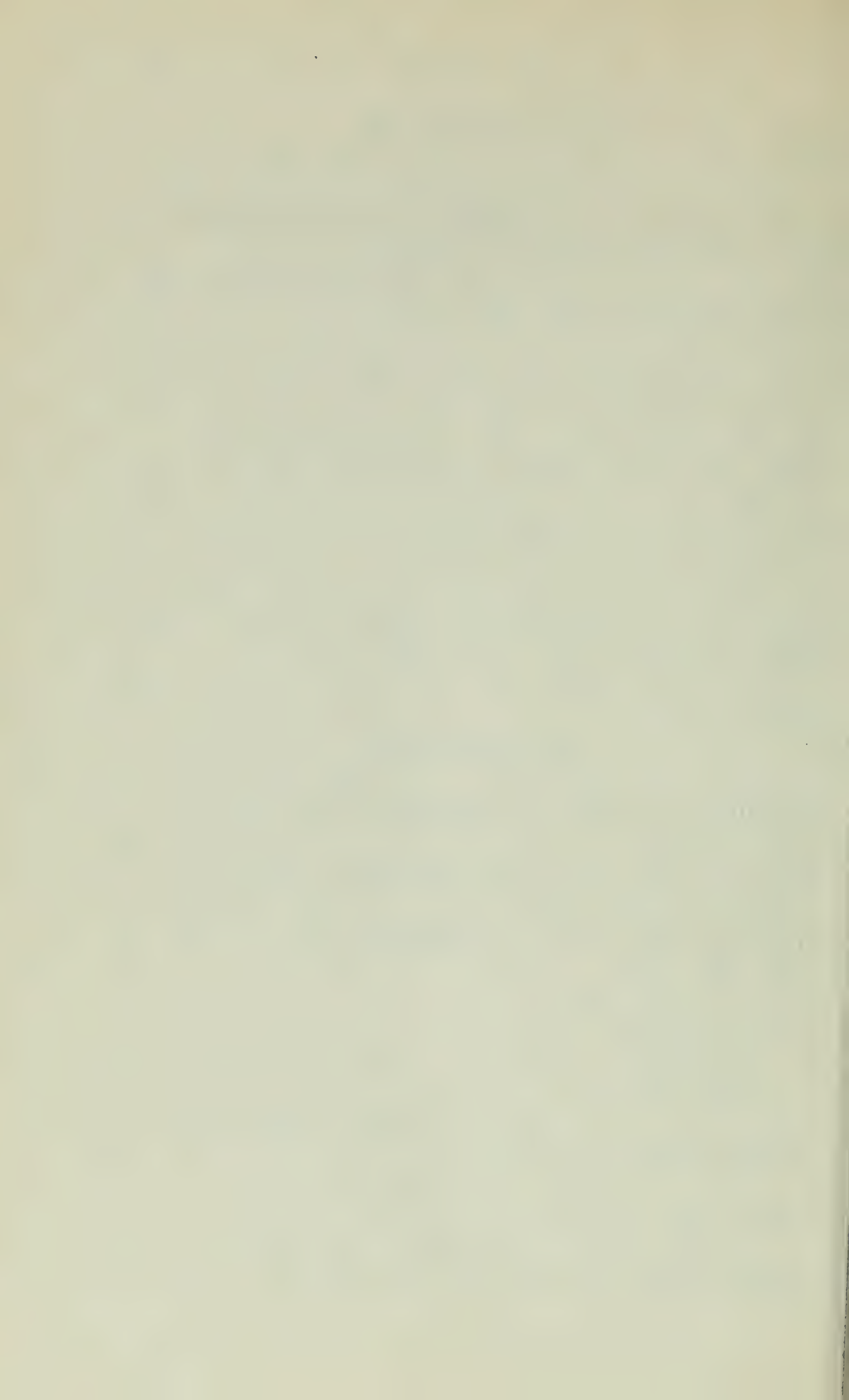
	Page
of law that said appellee, as sheriff, had received and was in possession of the sum of \$330.20 through enforce- ment by appellee Cassenos of a claim from which appel- lant had been released by a discharge in bankruptcy....	16
Conclusion	17

Table of Authorities Cited

Cases	Pages
Brawley v. Risdon Iron Works, 38 Cal. 676.....	8
Campbell v. Sutton, 62 Cal. App. 2d 621, 145 P. 2d 91....	10
Castro v. Tewksbury, 69 Cal. 562	8
Davis v. Aetna Acceptance Co., 293 U. S. 228, 55 S. Ct. 151	12
Edwards v. Bodkin, 43 Cal. App. 405.....	8
Gordon v. G. M. H. Wagner & Sons, 207 Cal. 373, 278 P. 863	10
Holmes v. Rowe, 9 Cir., 97 F. 2d 537.....	13, 15, 16
In re Tillery, D.C.Ga., 16 F. Supp. 877.....	10
People v. Casagrande, 43 Cal. App. 2d 818.....	10
People v. Simmons, 12 Cal. App. 2d 329.....	10
Shelby v. Houston, 38 Cal. 410.....	10

Codes and Statutes

Bankruptcy Act, Section 2 (15) (11 U.S.C.A., sec. 13 (15))	1
Bankruptcy Act, Section 17, subdivision a (11 U.S.C.A., sec. 35, subd. a)	11
Bankruptcy Act, Section 24, subdivisions a and b (11 U.S.C.A., sec. 47, subds. a, b).....	2
Bankruptcy Act, Section 63, subdivision a (11 U.S.C.A., sec. 103, subd. a)	12
Code of Civil Procedure:	
Section 1159	9
Section 1166	9
Section 1174	9
Federal Rules of Civil Procedure, Rule 8, subd. (a), 28 U.S.C.A., fol. Section 723c.....	8
General Order No. 37, 11 U.S.C.A., fol. Section 53.....	8
Judicial Code, Section 128 (28 U.S.C.A., sec. 225).....	2
Judicial Code, Section 262 (28 U.S.C.A., sec. 377).....	1



No. 10,991

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE J. BUZAS,

Appellant,

vs.

PETER CASSENOS and JOSEPH P. MOORE,
Sheriff of the County of Napa, State
of California,

Appellees.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant was adjudged a bankrupt on April 4, 1941 (T. 19-20), and on November 18, 1941, he was given his discharge (T. 20-21). On February 15, 1944, he filed with the District Court which had discharged him a petition to restrain the appellees from enforcing a judgment reflecting a claim from which he had been released by said discharge, and to obtain a turnover order of moneys collected through execution on the judgment. (T. 21-27.) Jurisdiction of the District Court is therefore sustained by section 262 of the Judicial Code (28 U.S.C.A., sec. 377), and section 2 (15) of the Bankruptcy Act (11 U.S.C.A., sec. 13 (15)).

The final order of the District Court was made on October 19, 1944, denying the petition, dissolving temporary restraining order which had been issued, and denying a turnover order. (T. 60-66.) Notice of appeal was filed November 29, 1944. (T. 66-67.) Jurisdiction of this court upon appeal to review the said order is therefore sustained by section 128 of the Judicial Code (28 U.S.C.A., sec. 225), and section 24, subdivisions a and b, of the Bankruptcy Act (11 U.S.C.A., sec. 47, subds. a, b).

STATEMENT OF THE CASE.

Appellant George Buzas filed a voluntary petition in bankruptcy and was adjudged a bankrupt on April 4, 1941. (T. 19-20.) In his schedules, subscribed and sworn to on March 26, 1941, he listed a claim of appellee Peter Cassenos, as follows (T. 6) :

“Peter Cassenos, Napa Road, Vallejo, Calif., claim for damages: Note: Said Cassenos filed suit December 7, 1940, in the Superior Court of Napa County for said amount, but to date has not taken default or had judgment entered in said action.....\$900.00”.

The complaint in the action thus referred to sought treble damages upon allegations that the defendant (appellant Buzas) had “forcibly and unlawfully” entered real property whereof plaintiff (appellee Cassenos) was in possession, and driven “a truck over the growing vines and crop of tomatoes injuring and damaging same in the sum of \$300.00”. (T. 31-32.)

There was no allegation in the complaint that the injury was “willful and malicious”. Judgment on the default of the defendant had been entered for the sum of \$900 on March 8, 1941, but execution had not been issued thereon at the time appellant filed his schedules and was adjudged a bankrupt. (T. 23.)

Appellant received his discharge in bankruptcy on November 18, 1941. (T. 20-21.) Ten months later, execution on the judgment was issued and levied. (T. 23, 33-34.) Proceedings were stayed by the state court, and on February 10, 1943, the state court vacated the judgment of March 8, 1941. (T. 24.) A new judgment for \$900 was entered in the action on April 22, 1943, wherein it was recited for the first time that the defendant “did willfully and maliciously injure the said property”. (T. 44-45.) Execution thereon was issued in April, 1943, and levied, and upon sale of appellant’s property thereunder in September and October, 1943, the sum of \$1080.20 came into the possession of the appellee Joseph Moore and his predecessor John Steckter, as sheriff of the County of Napa. (T. 24-25, 35-42.) All but the sum of \$330.20 thereof had been paid to the appellee Cassenos at the time appellant filed his petition herein.

The appellant filed his petition in the District Court on February 15, 1944, to restrain the enforcement of said judgment on the ground that it reflected a claim from which the appellant had been released by his discharge in bankruptcy on November 18, 1941, and to obtain a turnover to the appellant of the said sum of \$1080.20 collected under execution upon the judg-

ment. (T. 21-27.) He alleged in the petition that he had leased property to the appellee Cassenos and had reentered the premises on November 16, 1940, "believing in good faith that said term had ended", and that the entry was not "wrongful, nor intentionally done in willful or any disregard of petitioner's duty in the premises, but in accordance with the aforesaid right of re-entry". (T. 22.) An order to show cause and temporary restraining order directed against both appellees was issued by the District Court on February 15, 1944. (T. 28-30.) *Neither appellee filed an answer to the petition.* At the hearing it appeared that of the said sum of \$1080.20, the appellee Cassenos had received \$750 (T. 41-42) and \$330.20 was in the possession of the appellee sheriff (T. 49-50).

On November 28, 1944, the District Court made its order denying the petition, dissolving the temporary restraining order, and denying the turnover order. (T. 60-66.) This ruling was placed on the ground that the claim of appellee Cassenos was for a willful and malicious injury to property and was not released by the discharge in bankruptcy. (T. 65.) And this ruling raises the questions involved on the appeal, namely: 1. Did the District Court err in ruling that the discharge in bankruptcy did not constitute a bar to the claim of appellee Cassenos? 2. Was the bankrupt entitled to a turnover order?

SPECIFICATION OF ERRORS.

1. The District Court erred in finding that the claim of appellee Cassenos was one for a willful and malicious injury to property, for the reason that the evidence established the contrary as a matter of law.

2. The District Court erred in finding that the discharge in bankruptcy did not constitute a bar to the claim of appellee Cassenos, for the reason that the evidence established the contrary as a matter of law.

3. The District Court erred in denying the petition to enjoin enforcement of the claim of appellee Cassenos, for the reason that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim.

4. The District Court erred in dissolving the temporary restraining order, for the reason that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim of appellee Cassenos.

5. The District Court erred in denying a turnover order against the appellee Cassenos, for the reason that the evidence established as a matter of law that said appellee had received the sum of \$750 by enforcing a claim from which appellant had been released by a discharge in bankruptcy.

6. The District Court erred in denying a turnover order against the appellee Moore, for the reason that the evidence established as a matter of law that said appellee, as sheriff, had received and was in possession

of the sum of \$330.20 through enforcement by appellee Cassenos of a claim from which appellant had been released by a discharge in bankruptcy.

ARGUMENT OF THE CASE.

Summary of Argument.

The facts stated in the petition stand admitted by the failure of the appellees to deny them. The Cassenos claim was provable in bankruptcy. It was not a claim for willful and malicious injury to property. The claim was listed in the schedules of the bankrupt, and he was released therefrom by his discharge in bankruptcy. The District Court therefore erred in making findings to the contrary. Although the discharge constituted a bar to the claim of appellee Cassenos, such appellee nevertheless attempted to enforce the judgment to which the claim had been reduced. He caused execution to be issued on the judgment. He caused levy thereunder to be made on appellant's property. And he caused the property thus levied upon to be sold to satisfy the judgment. The District Court therefore erred in denying the petition to enjoin enforcement of the claim and in dissolving the temporary restraining order it had issued. Through enforcement of the released claim the appellee Cassenos had received the sum of \$750, and a further sum of \$330.20 had been received by the appellee sheriff but had not been disbursed to Cassenos. The District Court therefore erred in refusing to make a turnover order against the appellees and each of them. The order of

the District Court should be reversed with directions to enter an order permanently enjoining the enforcement of the Cassenos claim and ordering appellees to turn over to appellant the respective sums of \$750 and \$330.20.

1. SPECIFICATION OF ERROR NO. 1. THE DISTRICT COURT ERRED IN FINDING THAT THE CLAIM OF APPELLEE CASSENOS WAS ONE FOR A WILLFUL AND MALICIOUS INJURY TO PROPERTY, FOR THE REASON THAT THE EVIDENCE ESTABLISHED THE CONTRARY AS A MATTER OF LAW. |

This was designated as point 4 in appellant's Statement of Points on Appeal. (T. 76.)

In his petition, the appellant alleged the following respecting the claim of appellee Cassenos and the action in which the claim was reduced to judgment:

"That said Superior Court action is one for treble damages based upon an alleged forcible entry and unlawful entry by petitioner upon real property, which by an agreement in writing, was leased to said creditor by petitioner on or about December 18, 1939, at the approximate annual rental of \$70.00, the term of which was to end approximately October 15 to November 15, 1940; that petitioner believing in good faith that said term had ended, took over said real property on November 16, 1940, by right of re-entry, all in accordance with and pursuant to the terms and provisions of said agreement in writing, as aforesaid; that the damages allegedly claimed by said creditor is alleged to be treble damages in the sum of \$900.00; that petitioner's entry upon said real property, was not, in and of itself, wrongful, or

intentionally done in willful or any disregard of petitioner's duty in the premises, but in accordance with the aforesaid right of re-entry." (T. 22.)

No answer to the petition was filed by the appellees or either of them. As the Rules of Federal Civil Procedure apply to Bankruptcy cases (General Order No. 37, 11 U.S.C.A., fol. sec. 53), the foregoing allegations stand admitted by the appellees (Rule 8, subd. (a), Federal Rules of Civil Procedure, 28 U.S.C.A., fol. sec. 723c). Consequently, on the record before this court the evidence establishes as a matter of law that the claim of appellee Cassenos was not one for a willful and malicious injury to property.

Moreover, the complaint in the superior court action did not allege a willful and malicious injury to property. It is true that the complaint alleged that the defendant "forcibly and unlawfully entered in and upon" real property. (T. 31.) But the complaint did not state an action for "forcible entry" under the California Code of Civil Procedure, *for it did not seek the restitution of real property.* In California an action for "forcible entry" is a summary proceeding for obtaining possession of real property. It will not lie for a mere trespass. (*Castro v. Tewksbury*, 69 Cal. 562, 568.) And unless the plaintiff in an action for "forcible entry" recovers possession of real property, he cannot recover damages for a "forcible entry". (*Brawley v. Risdon Iron Works*, 38 Cal. 676, 677-78; *Edwards v. Bodkin*, 43 Cal. App. 405, 407.) The gov-

erning section of the California Code of Civil Procedure read as follows in pertinent parts:

Section 1159. "Every person is guilty of a forcible entry who either—

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstances of terror enters upon or into any real property; or,

2. Who, after entering peaceably upon any real property, turns out by force, threats, or menacing conduct, the party in possession."

Section 1166. "The plaintiff, in his complaint, which shall be verified, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry * * *, and claim damages therefor."

Section 1174. "If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; * * *

The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, * * * Judgment against the defendant guilty of the forcible entry, * * * may be entered in the discretion of the court either for the amount of the damages * * *, or for three times the amount so found."

The complaint, obviously, did not state a cause of action for "forcible entry". The next inquiry, then,

is what sort of action did it state. When analyzed the substance of the complaint was that defendant “forcibly and unlawfully” “drove a truck over the growing vines and crop of tomatoes injuring and damaging the same in the sum of \$300.00”. (T. 31-32.) Growing crops are regarded as personal property in California. (*Gordon v. G. M. H. Wagner & Sons*, 207 Cal. 373, 378, 278 P. 863; *Campbell v. Sutton*, 62 Cal. App. 2d 621, 624-25, 145 P. 2d 91.) Therefore the cause of action was one for injury to personal property. Neither the word “unlawful” nor the word “forcible” connotes “willful and malicious”. (*Shelby v. Houston*, 38 Cal. 410, 422; *People v. Casagrande*, 43 Cal. App. 2d 818, 822; *People v. Simmons*, 12 Cal. App. 2d 329.) Nothing in the complaint, therefore, is opposed to the previously quoted allegations of the petition herein (admitted by the appellees) that the claim of appellee Cassenos was not one for willful and malicious injury to property. Such was the status of the claim when appellant was given his discharge in bankruptcy on November 18, 1941. (T. 20-21.) Seventeen months later appellee Cassenos obtained a judgment stating for the first time that the defendant (appellant) “did wilfully and maliciously injure the said property of the plaintiff”. (T. 44-45.) It has been held that a change of the apparent theory of a claim without notice to a bankrupt, must be disregarded. (*In re Tillery*, D.C.Ga., 16 F. Supp. 877, 878.)

Enough has been said to demonstrate that the evidence established as a matter of law that the claim of appellee Cassenos was not one for a willful and mali-

cious injury to property, and that the finding of the District Court to the contrary (T. 65) cannot be sustained.

2. SPECIFICATION OF ERROR NO. 2. THE DISTRICT COURT ERRED IN FINDING THAT THE DISCHARGE IN BANKRUPTCY DID NOT CONSTITUTE A BAR TO THE CLAIM OF APPELLEE CASSENOS, FOR THE REASON THAT THE EVIDENCE ESTABLISHED THE CONTRARY AS A MATTER OF LAW.

This was designated as point 3 in appellant's Statement of Points on Appeal. (T. 76.) The District Court found:

"The judgment awarding respondent treble damages for a willful and malicious injury to property was fully supported by the allegations of the complaint upon which it was based; and it has not been rendered ineffective because of the decree of final discharge granted to petitioner." (T. 65.)

Section 17, subdivision a, of the Bankruptcy Act (11 U.S.C.A., sec. 35, subd. a) provides in pertinent part as follows:

"a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another * * *."

In the preceding subdivision it was demonstrated that the claim of appellee Cassenos was not one for willful and malicious injury to property. The remain-

ing question is whether the claim was a “provable debt”. “Provable debts”, so far as pertinent to this case, are defined in section 63, subdivision a, of the Bankruptcy Act (11 U.S.C.A., sec. 103, subd. a), as follows:

“a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, * * * (4) * * * a contract express or implied; * * *.”

That the claim of appellee Cassenos was a “provable debt”, as above defined, cannot be doubted. At the time appellant filed his petition in bankruptcy, the claim had been reduced to judgment dated March 8, 1941. (T. 23.) It was therefore provable under subdivision a (1), above quoted. And even if the judgment had been void on its face (which the record does not show), it would have been competent for said appellee to waive the tort, and prove his claim under subdivision a (4), above quoted, on “implied contract”. (*Davis v. Aetna Acceptance Co.*, 293 U.S. 228, 231, 55 S.Ct. 151, 153.)

It therefore follows that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim of appellee Cassenos, and the court erred in finding the contrary.

3. SPECIFICATION OF ERROR NO. 3. THE DISTRICT COURT ERRED IN DENYING THE PETITION TO ENJOIN ENFORCEMENT OF THE CLAIM OF APPELLEE CASSENOS, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT THE DISCHARGE IN BANKRUPTCY CONSTITUTED A BAR TO THE CLAIM.

This was designated as point 1 in appellant's Statement of Points on Appeal. (T. 76.)

In *Holmes v. Rowe*, 9 Cir., 97 F. 2d 537, this court decided that District Courts had plenary jurisdiction to grant the relief sought by the petition in the present case. It was there said, at pages 538 and 539:

(538) "The main contention of appellant is that the order of the District Court granting the injunction is erroneous, in that the (539) Court did not have jurisdiction of the subject-matter involved in said petitions, because of the fact that neither the petitions, nor the evidence, disclosed that the bankrupt had exhausted his remedies in the state courts so as to enable him to come into the Federal Court.

With this contention of appellant we do not agree. A review of the decisions discloses that a Federal District Court, once having obtained jurisdiction of a controversy, and having rendered a decision in the matter, has complete power to protect the judgment or decree which it has rendered and may go so far as to enjoin an action entertained in the state court by a litigant, involving the same subject-matter, when such action may in some way interfere with, or nullify the effect of said judicial determination. So here, the Court having discharged the appellee in bankruptcy, still retained sufficient jurisdiction to

grant an injunction restraining appellant from levying execution upon a judgment rendered in his favor by the state court against the appellee upon a claim adjudicated in the bankruptcy court.”

Since it appeared in this case that the evidence established as a matter of law that the discharge in bankruptcy constituted a bar to the claim which appellee Cassenos was enforcing and the appellee Moore was furthering, it was manifest error on the part of the District Court to deny appellant’s petition to enjoin such acts and conduct on the part of the appellees.

4. SPECIFICATION OF ERROR NO. 4. THE DISTRICT COURT ERRED IN DISSOLVING THE TEMPORARY RESTRAINING ORDER, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT THE DISCHARGE IN BANKRUPTCY CONSTITUTED A BAR TO THE CLAIM OF APPELLEE CASSENOS.

What was said in the preceding subdivision is equally applicable here. Separate statement is here made because Rule 20, subdivision (d), of this Court, requires such separate statement. Under the circumstances of the case, it was the manifest duty of the District Court to grant appellant a permanent injunction. It was plain error for the court to dissolve the temporary restraining order.

5. SPECIFICATION OF ERROR NO. 5. THE DISTRICT COURT ERRED IN DENYING A TURNOVER ORDER AGAINST THE APPELLEE CASSENOS, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT SAID APPELLEE HAD RECEIVED THE SUM OF \$750 BY ENFORCING A CLAIM FROM WHICH APPELLANT HAD BEEN RELEASED BY A DISCHARGE IN BANKRUPTCY.

This was designated as point 1 in appellant's Statement of Points on Appeal. (T. 76.)

The undisputed evidence showed that appellee Cassenos had received the sum of \$750 by enforcing the claim from which appellant had been released by his discharge in bankruptcy. The undersheriff of Napa County testified that as the result of execution, levy, and sale under the judgment which Cassenos recovered against appellant, the sums of \$600 and \$150 had been paid to appellee Cassenos. (T. 50-55.) He produced two receipts which were admitted in evidence. One showed payment to and receipt by appellee Cassenos of the sum of \$600 on September 21, 1943 (T. 42); the other showed payment to and receipt by appellee Cassenos of the sum of \$150 on October 1, 1943 (T. 40-41). A proper exercise of the power defined by this court in *Holmes v. Rowe*, 9 Cir., 97 F. 2d 532, demanded that the District Court order appellee Cassenos to turn over said sum of \$750 to appellant. The court erred in refusing to make such turnover order.

6. SPECIFICATION OF ERROR NO. 6. THE DISTRICT COURT ERRED IN DENYING A TURNOVER ORDER AGAINST THE APPELLEE MOORE, FOR THE REASON THAT THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT SAID APPELLEE, AS SHERIFF, HAD RECEIVED AND WAS IN POSSESSION OF THE SUM OF \$330.20 THROUGH ENFORCEMENT BY APPELLEE CASSENOS OF A CLAIM FROM WHICH APPELLANT HAD BEEN RELEASED BY A DISCHARGE IN BANKRUPTCY.

This was designated as point 1 in appellant's Statement of Points on Appeal. (T. 76.)

Additional undisputed testimony of the said undersheriff showed that as the result of execution, levy, and sale under said judgment, a further sum of \$330.20 came into the possession of appellee Moore, as sheriff, on September 21, 1943. (T. 49.) He claimed that costs in the sum of \$61.05 had been disbursed, leaving a balance in his possession of \$269.15. (T. 49-50.) This sum had not been paid to appellee Cassenos. (T. 50.) Appellant repeats, a proper exercise of the power defined by this court in *Holmes v. Rowe*, 9 Cir., 97 F. 2d 532, demanded that the District Court order appellee Moore to turn over the sum of \$330.20 to appellant. The appellee Cassenos, not the appellant, should be required to reimburse the sheriff for any costs disbursed. The court erred in refusing to make such turnover order.

CONCLUSION.

Appellant therefore respectfully submits that the order of the District Court should be reversed with directions to said court to enter an order permanently enjoining the enforcement of the Cassenos claim and ordering appellees to turn over to appellant the respective sums of \$750 and \$330.20.

Dated, San Francisco,
May 11, 1945.

MAX H. MARGOLIS,
HERBERT CHAMBERLIN,
BRANTLEY W. DOBBINS,
Attorneys for Appellant.

No. 11002

United States
Circuit Court of Appeals
For the Ninth Circuit.

PEOPLES BANK,

Appellant,

vs.

FEDERAL RESERVE BANK OF SAN FRAN-
CISCO and HENRY F. GRADY, Federal
Reserve Agent,

Appellees.

and

FEDERAL RESERVE BANK OF SAN FRAN-
CISCO,

Appellant,

vs.

PEOPLES BANK,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

APR 23 1945

PAUL P. O'BRIEN,
CLERK

No. 11002

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Henry F. Grady, Federal Reserve Agent, in Support of Motion to Dismiss....	78
Affidavit of W. M. Parker in Opposition to Motion for Summary Judgment of Defendant, and in Support of Plaintiff's Motion for Summary Judgment	83
Exhibit 1—Letter, Mar. 23, 1942, Federal Reserve Bank of San Francisco, Unsigned	86
Exhibit 2—Letter April 23, 1942, Federal Reserve Bank from Board of Directors of the Peoples Bank	87
Exhibit 3—Resolution Adopted by Board of Directors of Peoples Bank	89
Exhibit 4—Letter, June 13, 1944, Willkie, Owen, Otis, Farr & Gallagher to Albert C. Agnew	91
Exhibit 5—Letter, June 15, 1944, Willkie, Owen, Otis, Farr and Gallagher from Albert C. Agnew	95
Exhibit 6—Telegram, July 7, 1944, Albert C. Agnew, Esq., from Willkie, Owen, Otis, Farr & Gallagher	96

Index	Page
Exhibit 7—Telegram, July 7, 1944, Willkie, Owen, Otis, Farr & Gallagher, from Albert C. Agnew	97
Exhibit 8—Telegram, July 16, 1944, Mr. Albert C. Agnew from Willkie, Owen, Otis, Farr & Gallagher	97
Exhibit 9—Telegram, July 10, 1944, Willkie, Owen, Otis, Farr & Gallagher from Albert C. Agnew	98
Exhibit 10—Telegram, Willkie, Owen, Otis, Farr & Gallagher from J. P. Dreibelbis	98
<u>Affidavit of William A. Day in Support of Defendant's Motion for Summary Judgment</u>	21
Supplement Thereto	99
Exhibit A—Letter, Oct. 21, 1941, Mr. Clyde Doyle from R. B. West	34
Exhibit B—Letter, Dec. 5, 1941, Mr. Clyde Doyle from R. B. West	36
Exhibit C—Letter, Feb. 14, 1942, Mr. W. A. Day from Chester Morrill	38
Exhibit D—Letter, Feb. 20, 1942, Board of Governors, Federal Reserve System from E. B. Martin	39
Exhibit E—Letter, Feb. 21, 1942, R. B. West to Board of Governors of the Fed- eral Reserve System	41

Index	Page
Exhibit F—Letter, Mar. 11, 1942, Mr. E. B. Martin from R. B. West	42
Exhibit G—Letter, April 23, 1942, Mr. R. B. West from E. B. Martin	44
Exhibit H—Letter, May 6, 1942, Board of Directors, Peoples Bank, from L. P. Bethea	45
Exhibit I—Letter, May 7, 1942, Mr. E. B. Martin from R. B. West	49
Exhibit J—Application for Membership in the Federal Reserve System	53
Exhibit K—Letter, May 12, 1942, Mr. R. B. West from E. B. Martin	55
Exhibit L—Application for Membership in the Federal Reserve System	56
Exhibit M—Letter, May 14, 1942, Mr. E. B. Martin from R. B. West	66
Exhibit N—Letter, May 14, 1942, Mr. E. B. Martin from R. B. West	67
Exhibit O—Letter, May 15, 1942, Peoples Bank from R. T. Hardy	68
Affidavit of William A. Day in Support of Defendant's Motion for Summary Judgment, Supplemental	99
Exhibit 1—Letter, Feb. 20, 1942, Peoples Bank from R. B. West	104

Index	Page
Exhibit 2—Telegram, May 6, 1942, Mr. Day, Signed Bethea	105
Exhibit 3—Resolution Adopted by Board of Peoples Bank	107
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on	181
Designation of Contents of Record on, Ap- pellant, Federal Reserve Bank, (DC)..	173
Amendment Thereto	176
Designation of Contents of Record on, Ap- pellant's, Peoples Bank, (DC)	168
Amendment Thereto	177
Designation of Contents of Record on, Ap- pellant, Peoples Bank, (CCA).....	187
Designation of Contents of Record on, Ap- pellee, Henry F. Grady, (DC).....	169
Notice of, Federal Reserve Bank.....	171
Notice of, Peoples Bank	165
Statement of Points on Which Appellant, Peoples Bank, Intends to Rely on (DC)	166
Statement of Points on Which Appellant, Peoples Bank, Intends to Rely on (CCA)	185
Certificate of Clerk to Transcript of Record on Appeal	181

Index	Page
Complaint	3
Cross Appeal:	
Designation of Contents of Record on, Ap- pellant, Federal Reserve Bank, (CCA). 184	
Designation of Contents of Record on, Cross-Appellee, Peoples Bank (DC)....	179
Notice of Appeal and	171
Statement of Points on Which Appellant, Federal Reserve Bank, Intends to Rely on (DC)	172
Statement of Points on Which Appellant, Federal Reserve Bank, Intends to Rely on (CCA)	183
Designation of Contents of Record on Appeal, Appellant, Peoples Bank, (DC)	168
Amendment Thereto	177
Designation of Contents of Record on Appeal, Appellant, Peoples Bank, (CCA).....	187
Designation of Contents of Record on Appeal, Appellee, Henry F. Grady	169
Designation of Contents of Record on Appeal, on It's Cross-Appeal, Appellant, Federal Re- serve Bank, (DC)	173
Amendment Thereto	176
Designation of Contents of Record on Cross Appeal, Appellant, Federal Reserve Bank, (CCA)	184

Index	Page
Designation of Additional Contents of Record on Cross Appeal, Cross-Appellee, Peoples Bank, (DC)	179
Motion for Summary Judgment, Plaintiff's..	81
Affidavit in Opposition to	83
Motion of Defendant for Summary Judgment	19
Affidavit in Support of	21
Supplemental Affidavit in Support of....	99
Motion to Dismiss of Federal Reserve Bank of San Francisco	12
Motion to Dismiss of Henry F. Grady, Federal Reserve Agent	71
Affidavit in Support of	78
Names and Addresses of Proctors.....	1
Notice of Appeal and Cross Appeal, Federal Reserve Bank	171
Notice of Appeal, Peoples Bank	165
Opinion	149
Order Extending Time	169, 181
Order of Motions	148
Statement of Points on Which Appellant, Fed- eral Reserve Bank, Intends to Rely on It's Cross Appeal (DC)	172
Statement of Points Upon Which Appellant, Peoples Bank, Intends to Rely on Appeal (CCA)	185

Index**Page**

Statement of Points on Which Appellant, Peoples Bank, Intends to Rely on Appeal (DC)	166
Statement of Points on Which Appellant, Fed- eral Reserve Bank, Intends to Rely on Cross Appeal (CCA)	183
Transcript of Proceedings, Oct. 9 and 10, 1944 (In Part)	110

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In the District Court of the United States, Northern District of California, Southern Division

No. 23243-R

PEOPLES BANK,

Plaintiff,

v.

FEDERAL RESERVE BANK OF SAN FRANCISCO, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, and HENRY F. GRADY, Federal Reserve Agent, Defendants.

COMPLAINT

I.

(a) Jurisdiction is founded on the existence of a Federal question arising under Sections 1 and 8, Article I and the Fifth Amendment to the Constitution of the United States, and under Sec. 9 of the Federal Reserve Act as amended (12 U.S.C.A. 321-328, incl.).

(b) Jurisdiction of this Court is invoked under Sections 24 (1) (14), and 274d of the Judicial Code (28 U.S.C.A. 41, 400); and under Sec. 25(b) of the Federal Reserve Act as amended. (12 U.S.C.A. 632). The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.). [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

Plaintiff is, and at all times hereinafter mentioned was, a state banking corporation organized and existing under the laws of the State of California, with its principal place of business in Lakewood Village, County of Los Angeles, State of California; plaintiff is a member of the Federal Reserve System. (Federal Reserve Act as amended, Sec. 9, 12 U.S.C.A. 321).

III.

Defendant, the Federal Reserve Bank of San Francisco, is a federal reserve bank organized under the laws of the United States, and particularly under the provisions of Section 2 of the Federal Reserve Act as amended (12 U.S.C.A. 281-290, incl.) and maintains its principal office in San Francisco, California; defendant, Board of Governors of the Federal Reserve System, is an agency organized and existing under the laws of the United States (Section 10, Federal Reserve Act as amended, 12 U.S.C.A. 241); defendant, Henry F. Grady, Federal Reserve Agent, is Chairman of the Board of Directors of the Federal Reserve Bank of San Francisco, and maintains, under Regulations by the Board of Governors of the Federal Reserve System, a local office of said Board on the premises of the said Federal Reserve Bank of San Francisco, and acts as official representative of said Board of Governors of the Federal Reserve System, for the performance of the functions conferred upon it by the Federal Reserve Act in the

Twelfth Federal Reserve District. (Section 4, Federal Reserve Act as amended, 12 U.S.C.A. 305). [2]

IV.

On or about November 28, 1941, plaintiff, desiring to become a member of the Federal Reserve System, made application to defendant, the Board of Governors of the Federal Reserve System, under such rules and regulations as it had then prescribed for the right to subscribe to stock of the defendant, the Federal Reserve Bank of San Francisco, which was and is the Federal Reserve Bank organized within the Twelfth Federal Reserve District, which is the District within which plaintiff was then, and is now, located. On or about May 6, 1942, the Board of Governors of the Federal Reserve System approved the said application of the plaintiff and gave its permission to the plaintiff to become a stockholder of the Federal Reserve Bank of San Francisco, subject to certain conditions. Among said conditions was the following:

“4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of

usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the [3] Federal Reserve System, shall withdraw from membership in the Federal Reserve System.”

Plaintiff claims and alleges that the foregoing condition is arbitrary, unreasonable, capricious, discriminatory, ultra vires, and null and void in all respects, in that no power has been conferred upon the said defendant, Board of Governors of the Federal Reserve System, to exact of the plaintiff, or any other applying bank, such a condition to ownership of stock in a Federal Reserve Bank, or to membership in the Federal Reserve System.

V.

On or about May 7, 1942, the defendant, the Federal Reserve Bank of San Francisco, informed the plaintiff that as a condition to its subscribing to the stock of the defendant, Federal Reserve Bank of San Francisco, it would be required by said Bank to accept the said condition No. 4 and to agree to comply with the same and all thereof, said acceptance of said agreement to be evidenced by a resolution of its board of directors. Whereupon, and on or about May 12, 1942, the plaintiff, being desirous of acquiring the said stock in the defendant bank and of becoming a member of the Federal Reserve System, and under the compulsion of the said requirement of said defendant, did, by resolution of its board of directors, accept the said con-

dition No. 4, and agreed to comply with the same; that in exacting of plaintiff acceptance of said null and void condition No. 4, defendant, the Federal Reserve Bank of San Francisco, through its board of directors, violated the obligation, imposed upon it by statute, to administer its affairs, fairly and impartially, and without [4] discrimination against plaintiff as a member bank; thereafter thirty-four (34) shares of the capital stock of the Federal Reserve Bank of San Francisco were paid for by and were issued to plaintiff, and plaintiff is now the owner of said shares. The ownership of shares of defendant, Federal Reserve Bank of San Francisco, by plaintiff is an incident and condition to its membership in the said Federal Reserve System. (Sec. 9, Federal Reserve Act as amended, 12 U.S.C.A. 321, 328).

VI.

On or about the 17th day of February, 1944, without the assistance or prior knowledge of plaintiff, said Transamerica Corporation became the owner of five hundred (500) shares out of five thousand (5,000) shares of the capital stock of plaintiff and said shares have been transferred into the name of and issued to said Transamerica Corporation. Plaintiff is informed and believes, and therefore alleges, upon information and belief, that the acquisition of said shares was made without the written approval of defendant, the Board of Governors of the Federal Reserve System, and falls within the purview of condition 4 of the con-

ditions imposed upon plaintiff by defendant, the Federal Reserve Bank of San Francisco.

VII.

On or about April 4, 1944, plaintiff notified the defendant, Board of Governors of the Federal Reserve System, of said acquisition of stock of plaintiff by said Transamerica Corporation. [5]

VIII.

Defendants assert and contend that said condition No. 4 is in all respects valid and enforceable against the plaintiff and empowers the defendant, Federal Reserve Bank of San Francisco, to cancel the shares of said bank owned by plaintiff and to terminate plaintiff's membership in the Federal Reserve System; upon information and belief, plaintiff alleges that defendants intend to and will, unless restrained, take proceedings, predicated on said condition No. 4, designed to deprive plaintiff of its ownership of said shares of defendant, Federal Reserve Bank of San Francisco, and of membership in the Federal Reserve System, and of all the benefits thereof, to the great and irreparable injury and damage of plaintiff, and that such proceedings are imminent.

Plaintiff on the contrary asserts that the requirement by defendants, that as a condition precedent to the acquisition of stock of defendant, the Federal Reserve Bank of San Francisco, plaintiff should accept the said condition 4 and agree to comply therewith, is in all respects without authority in

law, and is unreasonable, arbitrary, capricious and discriminatory, and is invalid, null and void.

Plaintiff further asserts that defendants, or any of them, have no power or authority to take any proceedings predicated on said condition No. 4, designed to deprive plaintiff of its ownership of shares of the defendant, the Federal Reserve Bank of San Francisco, and of membership by the plaintiff in the Federal Reserve System; plaintiff further asserts that said void condition No. 4 is a cloud upon the title to the said shares of defendant, the Federal Reserve Bank of San Francisco, owned by plaintiff. [6]

IX.

That by reason of the premises there exists between the parties to this action an actual, justiciable controversy within the purview of the Federal Declaratory Judgment Act, Section 274d of the Judicial Code (28 U.S.C.A. 400), and plaintiff is entitled to have its rights adjudged and declared in this action.

X.

Plaintiff is immediately confronted with great irreparable loss, damage and injury as a result of said void, improper, ultra vires and discriminatory condition 4 imposed upon plaintiff by defendants. Unless relief be granted, as hereinafter prayed, plaintiff will incur irreparable and substantial loss and injury; there is no other adequate remedy available to plaintiff.

XI.

Plaintiff has at all times complied with all of the requirements of Section 9 of the Federal Reserve Act as amended (12 U.S.C.A. 324) the other pertinent statutes of the United States and with all lawful rules, regulations and conditions of the Board of Governors of the Federal Reserve System, and is entitled under said statutes and regulations to retain its stock in the defendant Federal Reserve Bank of San Francisco, and its membership in the Federal Reserve System, and is desirous of so retaining said stock and membership.

Wherefore, plaintiff demands that the Court adjudge decree and declare: [7]

1. The rights and legal relationships of the plaintiff and the defendants in the premises.

2. That said condition No. 4, hereinabove set forth, is unauthorized by law and beyond the power of said defendants or any of them to impose, and is invalid, null and void.

3. That the defendants and each of them, and the officers, attorneys and agents of each of them, be permanently restrained from the enforcement of said condition, or from taking any steps predicated thereon to effectuate the cancellation of plaintiff's stock in the defendant, Federal Reserve Bank of San Francisco, and the termination of plaintiff's membership in the Federal Reserve System.

4. That the defendants and each of them, and the officers, attorneys and agents of each of them, be restrained pendente lite from the enforcement

of said condition, or from taking any steps predicated thereon to effectuate the cancellation of plaintiff's stock in the defendant, Federal Reserve Bank of San Francisco, and the termination of plaintiff's membership in the Federal Reserve System.

5. Such other, further and different relief as the Court may deem equitable and meet in the premises.

SANNER, FLEMING & IRWIN
JOHN AMOS FLEMING
WILLKIE, OWEN, OTIS,
FARR & GALLAGHER
CARL M. OWEN

Attorneys for Plaintiff.

[8]

State of California,

City and County of San Francisco. ss.

John Amos Fleming, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the foregoing complaint, and makes this verification for and on behalf of said plaintiff, because no officer of said plaintiff is within the Northern District of California, Southern Division; that he has read the foregoing complaint and the same is true as of his own knowledge and belief except as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

JOHN AMOS FLEMING

Subscribed and sworn to before me this 4th day of April, 1944.

[Seal]

RUTH MATUSCH

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 3, 1947.

[Endorsed]: Filed Apr. 6, 1944 [9]

[Title of District Court and Cause.)

MOTION OF DEFENDANT FEDERAL RESERVE BANK OF SAN FRANCISCO TO DISMISS

Comes now, defendant Federal Reserve Bank of San Francisco, and files this, its motion to dismiss the Complaint of plaintiff, on file herein, and for grounds thereof states:

I.

The said Complaint fails to state a claim against this defendant upon which relief can be granted.

II.

It appears upon the face of said Complaint that defendant Board of Governors of the Federal Reserve System, an administrative body of the executive branch of the Government of the United States and an independent board or establishment of the United States, is an indispensable party to this suit and that this is a suit against the United States,

and it [10] further appears that the United States has not been joined as a party defendant hereto and has not consented to be sued.

III.

It appears upon the face of said Complaint that defendant Board of Governors of the Federal Reserve System is the only proper defendant named, if it may be sued at all, that such defendant is an inhabitant of the District of Columbia, without the Northern District of California, that the process of this Court will not reach said defendant in this action, and that the said action will be futile unless said defendant consents to appear herein.

IV.

It appears upon the face of said Complaint that the individual members of defendant Board of Governors of the Federal Reserve System, in their official capacities as such members, are indispensable parties to this suit and have not been joined as parties defendant, that such members, and each of them, in their official capacities, are inhabitants of the District of Columbia, without the Northern District of California, that the process of this Court will not reach such members, in said capacities, in this action, and that the said action will be futile unless said members are joined as parties defendant in said capacities, and each such member consents to appear herein.

V.

It appears upon the face of said Complaint that

this defendant Federal Reserve Bank of San Francisco did not, and does not now, have any power, authority, jurisdiction, or discretion whatever, to do the things which are charged in said Complaint, and which the Complaint seeks to enjoin, or as to which it seeks a declaration.

VI.

The Complaint fails to allege how, or in what manner, this defendant informed plaintiff that, as a condition to its subscribing to the stock of defendant Federal Reserve Bank of San Francisco, it would be re- [11] quired by said bank to accept condition No. 4 and to agree to comply with the same and all thereof, as alleged in Paragraph V of said Complaint.

VII.

The Complaint fails to allege how, or in what manner, this defendant compelled or coerced plaintiff to accept said condition, as a condition of membership in the Federal Reserve System, as alleged in Paragraph V of said Complaint, when such membership is purely voluntary, or how, or in what manner, this defendant could have compelled or coerced plaintiff as alleged, or whether this defendant has any power, authority, jurisdiction, or discretion, statutory or otherwise, with respect to said matter.

VIII.

The Complaint fails to allege how, or in what manner, this defendant exacted of plaintiff said condition, or how, or in what respects, such exaction

constituted a violation of the statutory obligation imposed upon defendant bank, through its board of directors, to administer its affairs fairly and impartially, and without discrimination in favor of, or against any member bank, or banks, when at the time of the claimed exaction of said condition, plaintiff was not, and could not have been, a member bank of the Federal Reserve System, within the meaning of the statute imposing the obligation, and was not, and could not have been, entitled to the benefit thereof.

IX.

The Complaint fails to allege the time when, or the manner in which, this defendant asserted, and/or contended, that condition No. 4 was in all, or any respects, valid and/or enforceable against plaintiff, and/or empowered this defendant to cancel the shares of stock of defendant bank owned by plaintiff, and/or to terminate plaintiff's membership in the Federal Reserve System.

X.

The Complaint fails to allege what proceedings, if any, are intended to be taken by this defendant, predicated on condition No. 4, as alleged in Paragraph VIII of said Complaint. [12]

XI.

The Complaint fails to show that plaintiff is threatened with, or in danger of suffering, any immediate, irreparable damage or injury, by reason of any of the matters set forth in said Complaint.

XII.

The Complaint fails to allege how, or in what manner, said condition No. 4 constitutes, or is, a cloud on plaintiff's title to the shares of stock owned by it in defendant bank, as alleged in Paragraph VIII of said Complaint.

XIII.

It appears upon the face of said Complaint that the question as to the validity of said condition No. 4 raised by plaintiff, may be asserted by it in the administrative proceedings, or hearing, before defendant Board of Governors of the Federal Reserve System, provided by statute for the forfeiture of plaintiff's membership in said system and the surrender by it of its stock in defendant Federal Reserve Bank, if any such proceeding is hereafter instituted, that such proceeding has not been instituted or taken, and that plaintiff's suit is premature, at least until the exhaustion of said administrative remedy.

XIV.

It appears upon the face of said Complaint that no actual controversy exists within the meaning of Section 274d of the Judicial Code (U.S. Code, Title 28, Sec. 400), and that this is not a proper case for a declaratory judgment.

XV.

The Complaint fails to allege, as to this defendant, any case or controversy properly within the jurisdiction of this Court, and the Court is without

jurisdiction of the subject matter sought to be alleged in said Complaint.

XVI.

The Complaint fails to allege in what particulars, in what capacity, [13] or in what manner, defendant Henry F. Grady, Federal Reserve Agent, performed any functions whatever in connection with the subject matter of plaintiff's Complaint, or what proceedings are intended to be taken by said defendant, as alleged in Paragraph VIII of said Complaint.

XVII.

It does not appear in said Complaint, nor can it be ascertained therefrom, whether defendant Federal Reserve Bank of San Francisco is sued herein in its individual corporate capacity, or as agent for defendant Board of Governors of the Federal Reserve System, or said other defendant Henry F. Grady, Federal Reserve Agent.

Said motion to dismiss the Complaint herein will be made and based upon all of the files, papers and proceedings in this cause, including said Complaint, this motion and the notice of the hearing thereof, and upon the attached memorandum of points and authorities.

Dated: San Francisco, California, May 29, 1944.

ALBERT C. AGNEW

Counsel for Defendant Federal Reserve Bank of San Francisco

JOHN A. O'KANE

Of Counsel [14]

NOTICE OF MOTION

To: Peoples Bank, the plaintiff above named,
Messrs. Sanner, Fleming & Irwin and John
Amos Fleming, 5658 Wilshire Boulevard, Los
Angeles, California, and Messrs. Willkie,
Owen, Otis, Farr & Gallagher, and Carl M.
Owen, 15 Broad Street, New York City, its
attorneys.

You, and each of you, will please take notice that
the undersigned will bring the foregoing motion
to dismiss plaintiff's Complaint on for hearing be-
fore this Court in the Court Room of the Honor-
able Michael J. Roche, Judge of the above entitled
Court, located in the Post Office Building, at 7th
and Mission Streets, in the City and County of San
Francisco, State of California, on the 10th day of
June, 1944, at 9 o'clock a.m., of said day or as
soon thereafter as counsel can be heard.

Dated: San Francisco, California, May 29, 1944.

ALBERT C. AGNEW

Counsel for Defendant Fed-
eral Reserve Bank of San
Francisco

JOHN A. O'KANE

Of Counsel

[Endorsed]: Filed May 31, 1944. [15]

[Title of District Court and Cause.]

MOTION OF DEFENDANT FEDERAL RESERVE BANK OF SAN FRANCISCO FOR SUMMARY JUDGMENT.

Comes now, the defendant Federal Reserve Bank of San Francisco, and without prejudice to its right to have its Motion to Dismiss, filed contemporaneously herewith, granted, and without waiving its said motion, files this, its further motion for an order giving summary judgment to said defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the following grounds, to-wit: that the Complaint in said action and the affidavit of William A. Day in support of this motion, served and filed herewith, shows that as between plaintiff and this defendant there is no genuine issue as to any material fact and that this defendant is entitled to a judgment as a matter of law.

Said motion will be made and based upon all of the files, papers and proceedings in this cause, including said Complaint, affidavit of William A. Day, this motion, and the notice of the hearing thereof, and upon the attached memorandum of points and authorities.

Dated: San Francisco, California, May 29, 1944.

ALBERT C. AGNEW

Counsel for Defendant Federal Reserve Bank of San Francisco

JOHN A. O'KANE

Of Counsel [16]

NOTICE OF MOTION

To: Peoples Bank, the plaintiff above named, Messrs. Sanner, Fleming & Irwin and John Amos Fleming, 5658 Wilshire Boulevard, Los Angeles, California, and Messrs. Willkie, Owen, Otis, Farr & Gallagher, and Carl M. Owen, 15 Broad Street, New York City, its attorneys.

You, and each of your, will please take notice that the undersigned will bring the above Motion on for hearing before this Court in the Court Room of the Honorable Michael J. Roche, Judge of the above entitled Court, located in the Post Office Building, at 7th and Mission Streets, in the City and County of San Francisco, State of California, on the 19 day of June, 1944, at 10 o'clock a.m., of said day or as soon thereafter as counsel can be heard.

Dated: San Francisco, California, May 29, 1944.

ALBERT C. AGNEW

Counsel for Defendant Federal Reserve Bank of San Francisco

JOHN A. O'KANE

Of Counsel

[Endorsed]: Filed May 31, 1944. [17]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM A. DAY IN SUP-
PORT OF MOTION OF DEFENDANT
FEDERAL RESERVE BANK OF SAN
FRANCISCO FOR SUMMARY JUDGMENT

State of California,

City and County of San Francisco—ss.

William A. Day, being first duly sworn, deposes
and says:

That affiant has read the Complaint of plaintiff
Peoples Bank, on file herein, and that he knows
the contents thereof; that affiant is, and was, at all
of the times mentioned in said Complaint, an officer
of defendant, Federal Reserve Bank of San Fran-
cisco, to-wit, the President thereof, and that he is
duly authorized to make, and makes, this affidavit
for and on behalf of defendant Federal Reserve
Bank of San Francisco, in support of said defend-
ant's Motion for Summary Judgment on file here-
in; [21]

That affiant has caused an examination to be
made of the records and files of defendant Fed-
eral Reserve Bank of San Francisco, hereinafter
referred to as "Reserve Bank," respecting the acts
and conduct of said defendant concerning plain-
tiff's application for membership in the Federal
Reserve System, plaintiff's ownership of shares of
stock in defendant Reserve Bank, which is an in-
cident and condition of said membership, and the
granting of said application on conditions, particu-
larly condition No. 4, which constitutes the subject

matter of plaintiff's Complaint, and that of his own knowledge said records and files reveal the following facts:

That on or about the 17th day of October, 1941, defendant Reserve Bank received a letter dated October 15, 1941, signed by Clyde Doyle, an attorney at law, addressed to Mr. H. A. Sonne, former Chief Examiner of defendant Reserve Bank, in which Mr. Doyle, on behalf of said plaintiff Peoples Bank, then in process of organization and incorporation as a state bank, made informal application for membership in the Federal Reserve System; that the concluding paragraph of said letter is as follows:

“It is the desire of the group to move forward as expeditiously as possible in this connection. Your forwarding of the necessary application by return mail, and informing us of the information required to be supplied, will be appreciated, for which I thank you in advance.”

That on or about the 20th day of October, 1941, a copy of said letter was mailed by defendant Reserve Bank to defendant Board of Governors of the Federal Reserve System, hereinafter referred to as “Board,” and on or about the 21st day of October, 1941, defendant Reserve Bank replied thereto; that attached hereto, marked Exhibit A, hereby referred to and made a part hereof, [22] is a full, true and correct copy of defendant Reserve Bank's reply, dated October 21, 1941; that said defendant in said letter acknowledged receipt of

plaintiff's letter, called attention to the provisions of Section 9 of the Federal Reserve Act, as amended, and Regulation H, issued by the defendant Board pursuant thereto, respecting applications for membership by state banks in the Federal Reserve System, and the fact that, under the provisions thereof, an application could not be entertained by said defendant Board thereunder until plaintiff was organized and incorporated; that there was enclosed with said letter three sets of form of application, prepared and furnished by said defendant Board, for use by plaintiff Peoples Bank when said incorporation had been accomplished; that said letter further advised Mr. Doyle with respect to the completion of said application and the filing of an original and copy thereof with defendant Reserve Bank, as required by defendant Board under the provisions of said Regulation H, and Mr. Doyle was informed that as soon after receipt of said application as would be practicable, an investigation would be made by defendant Reserve Bank, which is usual in such cases, after which, the application would be forwarded by defendant Reserve Bank to defendant Board for its consideration and action thereon;

Thereafter and on or about the 4th day of December, 1941, defendant Reserve Bank received a letter dated December 2, 1941, signed by Mr. Doyle, enclosing plaintiff's application, in which the following statement is made:

“Enclosed in duplicate original is Application for Membership in the Federal Reserve

System made by Peoples Bank, Lakewood Village, Los Angeles County, California.”

That said application was incomplete in several important respects, and on or about the 5th day of December, 1941, defendant Reserve Bank advised Mr. Doyle of the particulars in [23] which said application was incomplete; that attached hereto, marked Exhibit B, hereby referred to and made a part hereof, is a full, true and correct copy of defendant Reserve Bank’s letter in this regard;

Thereafter and on or about the 27th day of January, 1942, said application of plaintiff Peoples Bank, having been meanwhile completed, was transmitted to the defendant Board, together with the usual report of investigation of applicant made by defendant Reserve Bank under instruction of said defendant Board; that said application was transmitted by defendant Reserve Bank to said defendant Board for its consideration and action thereon without any recommendation of any kind as to the granting or denial thereof made by defendant Reserve Bank;

That thereafter said defendant Board considered said application and on or about the 14th day of February, 1942, acted thereon by denying the same; that attached hereto, marked Exhibit C, hereby referred to and made a part hereof, is a full, true and correct copy of a letter of said defendant Board’s action and requested to advise the plaintiff in which affiant advised of said defendant Board’s action and requested to advise the plaintiff

thereof; that said letter was received by affiant on the 19th day of February, 1942, and plaintiff was advised of defendant Board's action the day following, namely February 20, 1942;

Thereupon and on said February 20, 1942, said plaintiff Peoples Bank forwarded a letter to defendant Reserve Bank, dated the same day, addressed to the defendant Board, in which it acknowledged receipt of the information respecting rejection of its application and requested said defendant Board to reconsider its application in the light of certain changes made in its stock ownership, which changes were set out in the said letter; that attached hereto, marked Exhibit D, hereby referred to and made a [24] part hereof, is a true and correct copy of said letter without the list of stockholders therein referred to as attached;

That this last mentioned letter was received by defendant Reserve Bank on February 21, 1942, and transmitted the same day, airmail, to defendant Board for its consideration, without any comment or recommendation whatever by defendant Reserve Bank with respect thereto, but with the request that defendant Board inform defendant Reserve Bank, by telegram, of its determination with respect to plaintiff's request for reconsideration of its said application; that attached hereto, marked Exhibit E, hereby referred to and made a part hereof, is a full, true and correct copy of said letter of transmittal; that thereafter, and on or about the 25th day of February, 1942, defendant Reserve Bank was advised, by telephone, by defendant Board

that it was unwilling to change its original position and reconsider plaintiff's said application; that thereafter, the same day, defendant Reserve Bank informed plaintiff Peoples Bank, by telephone, of said defendant Board's determination;

Subsequently, and on or about the 11th day of March, 1942, defendant Reserve Bank was advised by telegram from said defendant Board that it would be glad to reconsider the application of plaintiff bank for membership in the Federal Reserve System upon a definite showing, to be made by the directors of plaintiff bank, as outlined in said telegram; that this advice was immediately communicated to plaintiff bank, by defendant Reserve Bank, by letter dated March 11, 1942, in which the showing to be made by said directors of plaintiff bank, as required by said defendant Board, is set forth; that a full, true and correct copy of defendant Reserve Bank's letter in this regard is attached hereto, marked Exhibit F, hereby referred to and made a part hereof;

That on or about the 23rd day of April, 1942 plain- [25] tiff bank agreed to accept defendant Board's proposal for a reconsideration of its application on the showing required, and on or about said last mentioned date forwarded to defendant Reserve Bank a letter dated that day, in which the information and showing required by defendant Board was made; that a true and correct copy of said forwarded letter, without enclosures, is attached hereto, marked Exhibit G, hereby referred to and made a part hereof;

That the showing thus made by plaintiff People's Bank, in response to defendant Board's telegram dated March 11, 1942, was, on the 28th day of April, 1942, forwarded by defendant Reserve Bank to defendant Board for its consideration and decision;

That on the 6th day of May, 1942, defendant Board informed affiant, by telegram, that the application of plaintiff bank for membership in the Federal Reserve System had been approved, subject to certain conditions; that these conditions, including condition No. 4 now complained of by plaintiff, are set forth in a letter of the said defendant Board, dated May 6, 1942, addressed to the Board of Directors of plaintiff bank, which was sent to defendant Reserve Bank for forwarding to plaintiff bank; that immediately upon receipt of said letter, the same was forwarded by defendant Reserve Bank to plaintiff bank, and that a full, true and correct copy thereof is attached hereto, marked Exhibit H, hereby referred to and made a part hereof; that in addition thereto defendant Reserve Bank sent plaintiff bank a letter dated May 7, 1942, informing plaintiff bank of defendant Board's approval of its application on conditions, the particular conditions upon which said application had been approved by said defendant Board and the steps necessary to be taken by plaintiff for the completion of plaintiff's membership in the Federal Reserve System; that a full, true and correct copy of this last mentioned letter is attached hereto,

marked Exhibit I, hereby [26] referred to and made a part hereof;

That on or about the 12th day of May, 1942, plaintiff bank accepted said conditions without objection to any thereof, by resolution of its board of directors, duly adopted, and notified defendant Reserve Bank to that effect by letter dated the same day; that a full, true and correct copy of certified copy of said resolution is attached hereto, marked Exhibit J, hereby referred to and made a part hereof; that a true copy of said last mentioned letter is attached hereto, marked Exhibit K, hereby referred to and made a part hereof; that a true copy of plaintiff's application for membership, referred to in said letter, as originally filed November 28, 1941, is attached hereto, marked Exhibit L, hereby referred to and made a part hereof;

Thereafter, on the 14th day of May, 1942, defendant Reserve Bank addressed a letter to plaintiff Peoples Bank acknowledging receipt of plaintiff's letter dated May 12, 1942, and enclosures, and advising said plaintiff that, as outlined in its letter of May 7, 1942, it would be necessary for plaintiff to make payment of its subscription to the capital stock of defendant Reserve Bank, and open its reserve account with the Los Angeles Branch of defendant Reserve Bank, and to receive from the State Superintendent of Banks authorization to commence business, before membership in the Federal Reserve System would be complete; that a full, true and correct copy of defendant, Reserve Bank's letter in this regard is attached hereto, marked Ex-

hibit M, hereby referred to and made a part hereof;

That later on said 14th day of May, 1942, defendant Reserve Bank advised plaintiff bank, by telegram, that its membership had been completed, said matters as to completion of membership having meanwhile been accomplished by plaintiff Peoples Bank, and that such membership would become effective on May 15, 1942; that later on said 14th day of May, 1942, defendant [27] Reserve Bank, by letter dated that day, confirmed its said telegram as to membership of plaintiff bank in the Federal Reserve System and the said effective date thereof, acknowledged receipt of confirmation by the Los Angeles Branch of defendant Reserve Bank of plaintiff's remittances in payment for the capital stock of defendant Reserve Bank and, among other things, informed plaintiff bank that its formal certificate of membership would be issued and mailed to it by said defendant Board, from Washington, D. C.; that a full, true and correct copy of said defendant Reserve Bank's last mentioned letter, dated May 14, 1942, is attached hereto, marked Exhibit N, hereby referred to and made a part hereof;

That finally on or about the 15th day of May, 1942, defendant Reserve Bank, by letter dated that day, advised plaintiff bank that it had sent plaintiff, under separate cover, a binder containing the current circulars issued by defendant Reserve Bank and a current set of regulations issued by defendant Board, together with a copy of the Federal Reserve Act, as amended, with the suggestion that one of its officers thoroughly familiarize himself therewith in

order that plaintiff bank might obtain the maximum benefit from its membership in said Federal Reserve System; that a full, true and correct copy of said letter dated May 15, 1942, is attached hereto, marked Exhibit O, hereby referred to and made a part hereof; that ever since said 15th day of May, 1942, plaintiff Peoples Bank has been, and now is, a member bank of the Federal Reserve System and the owner of 34 shares of stock of defendant Reserve Bank, which, as aforesaid, is an incident and condition of said membership;

That from the foregoing it is patent, and the fact is, that the defendant Reserve Bank had nothing whatever to do with the consideration or reconsideration of plaintiff's application for membership in the Federal Reserve System, or the original [28] denial or subsequent approval of the same by defendant Board on conditions; that defendant Reserve Bank had nothing whatever to do with the imposition or exaction by said defendant Board of said condition No. 4, or of any other conditions, imposed on, or exacted of, plaintiff bank by defendant Board respecting plaintiff's membership in the Federal Reserve System; that defendant Reserve Bank did not impose on, or exact of, plaintiff said condition No. 4, or any other conditions, and that said defendant made no requirement of plaintiff with respect to the same or the acceptance thereof;

That at all of the times mentioned in plaintiff's Complaint, and at all of the times hereinabove mentioned, defendant Reserve Bank acted purely

in a ministerial and clerical capacity on behalf of defendant Board, and at none of said times did defendant Reserve Bank have, nor has it now, any power, authority, jurisdiction, or discretion whatever, under any existing statute, rule, regulation, or otherwise, concerning the consideration of, or decision on, any application for membership in the Federal Reserve System, including plaintiff's said application, or the imposition or exaction of conditions of membership of any kind, or the making of any requirement with respect thereto, or the removal of any condition once imposed, or the taking of any proceedings, statutory, administrative, or otherwise, for the enforcement of any such conditions; that in this behalf affiant avers that under Section 9 of the Federal Reserve Act, as amended, and Regulation H issued by defendant Board pursuant thereto, said defendant Board at all of the said times had, and now has, sole and exclusive power, authority, jurisdiction and discretion with respect to the said matters, and each and all thereof; affiant further avers that, in addition to lack of power, authority, jurisdiction and discretion respecting the taking of any proceedings, statutory, administrative, or otherwise as to the [29] enforcement of said condition No. 4, as hereinabove averred, defendant Reserve Bank, at none of the times hereinabove or in said Complaint mentioned, has had, or now has, any such intention;

That at no time has defendant Reserve Bank asserted or contended to plaintiff, or to any other person whatever, that said condition No. 4 was,

or is, in all or any respects, valid or enforceable against plaintiff, or empowers said defendant Reserve Bank to cancel the shares of defendant Reserve Bank owned by plaintiff, or to terminate plaintiff's membership in the Federal Reserve system;

That at no time up until the time of the filing of its Complaint in this case did plaintiff bank ever complain, or intimate, to defendant Reserve Bank, its Board of Directors, officers, or employees, or any of them, that it had any complaint whatsoever respecting its treatment by any of said persons in the administration of defendant Reserve Bank's affairs, or that it had not been fairly or impartially treated, or that it had been discriminated against by reason of any matter or thing alleged in plaintiff's said Complaint or any other matter or thing whatsoever.

That affiant is familiar with the duties, statutory and otherwise, of defendant Henry F. Grady, as Federal Reserve Agent, and knows of his own knowledge that said defendant Federal Reserve Agent had nothing whatever to do with the consideration or reconsideration of plaintiff's application for membership in the Federal Reserve System, or the original denial or subsequent approval of the same by defendant Board on conditions; that said defendant Federal Reserve Agent had nothing whatever to do with the imposition or exaction by said defendant Board of said condition No. 4 or any other conditions imposed on, or exacted of, plaintiff bank by defendant Board respecting plaintiff's

membership in the Federal Reserve System; that defendant Federal Re- [30] serve Agent did not impose on, or exact of, plaintiff said condition No. 4 or any other conditions, and that said defendant made no requirement of plaintiff with respect to the same, or the acceptance thereof;

That at none of the times mentioned in plaintiff's Complaint, or hereinabove mentioned, did defendant Federal Reserve Agent have, nor has he now, any power, authority, jurisdiction, or discretion whatever under any existing statute, rule, regulation, or otherwise, concerning the consideration of, or decision on, any application for membership in the Federal Reserve System, including plaintiff's said application, or the imposition or exaction of conditions of membership of any kind, or the making of any requirement with respect thereto, or the removal of any condition once imposed, or the taking of any proceeding, statutory, administrative, or otherwise, for the enforcement of any such conditions; that as aforesaid, said defendant Board, at all of the times mentioned in the Complaint and at all of the times hereinabove mentioned, had, and now has, exclusive power, authority, jurisdiction and discretion with respect to the said matters, and each and all thereof;

That, by reason of the matters and things hereinabove averred, affiant further avers that as between plaintiff Peoples Bank and defendant Federal Reserve Bank of San Francisco, there is no genuine issue as to any material fact and that this

defendant is entitled to a judgment as a matter of law.

Dated: San Francisco, California, May 29, 1944.

WILLIAM A. DAY

Subscribed and sworn to before me this 31st day of May, 1944.

[Seal]

KATHRYN E. STONE

Notary Public in and for the City and County of
San Francisco, State of California. [31]

EXHIBIT A

Federal Reserve Bank of San Francisco

October 21, 1941.

Mr. Clyde Doyle

Suite 612, Jergins Trust Building,

Long Beach, California

Re: Your File No. 658

Dear Mr. Doyle:

This is to acknowledge receipt of your letter of October 15, 1941, enclosing a signed copy of letter dated September 24, 1941, addressed to yourself and John Gee Clark by Geo. J. Knox, Superintendent of Banks, in which permission is granted you to proceed with the organization of "People's Bank", Lakewood Village, Los Angeles County, California. It is noted that the permission to organize the bank is based on the condition that Federal Deposit insurance be obtained, to become effective concurrently with the opening of the bank. As a

medium to that end, you have chosen membership in the Federal Reserve System.

Section 9 of the Federal Reserve Act provides that—

“Any bank incorporated by special law of any State, or organized under the general laws of any State of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System”

It, therefore, appears necessary that the organization of the subject bank and its incorporation be completed before an application for membership in the Federal Reserve System is filed.

There are enclosed three sets of approved application forms for your use when incorporation of the institution has been accomplished. There is also enclosed a copy of Regulation H pertaining to membership of State banking institutions in the Federal Reserve System.

When the board of directors has authorized the officers of the bank to make application, the application, together with all exhibits, should be prepared in triplicate and the original and one copy filed with the Federal Reserve Bank of San Francisco—the third copy should be retained for the bank's record. The bank being newly organized and not yet licensed to do business, obviously all exhibits called for in the application cannot be furnished. If the bank shows any assets, a certified

statement of resources and liabilities (Exhibit I) should be attached, as should also certified copies of its articles of incorporation, together with certified copy of the Superintendent of Bank's certificate of approval thereof. Other exhibits seem inapplicable.

As soon after receipt of the application as is practicable, we shall make the investigation which is usual in connection with requests for membership, after which the application will be forwarded to the Board of Governors of the Federal Reserve System, Washington, D. C., for its consideration and action thereon.

Should there arise any questions regarding the preparation or filing of the application, please feel free to call upon us.

Yours very truly,

R. B. WEST

Vice President.

Enclosures

EXHIBIT B

Federal Reserve Bank of San Francisco

December 5, 1941

Mr. Clyde Doyle,
612 Jergins Trust Building,
Long Beach, California.

Dear Mr. Doyle:

This will acknowledge receipt of your letter of December 2, enclosing, in duplicate, the application of "People's Bank", Lakewood Village, Los

Angeles County, California, for membership in the Federal Reserve System.

Affixing the corporate seal of the bank appears to have been overlooked and the page of the application on which it is to be placed is returned herewith. With your letter returning this page, please advise if W. M. Parker is both Secretary and Cashier or whether he holds the title of Cashier only.

We learn from the office of the Superintendent of Banks that the extra copy of the bank's articles of incorporation sent there was returned to you before receipt of your letter requesting that it be delivered to us. Two certified copies of the articles, which we shall appreciate your forwarding to us when available, are required to complete the application.

Our investigation in connection with the application will be made at the earliest possible date and, thereafter, it will be handled for transmission to the Board of Governors of the Federal Reserve System as expeditiously as practicable.

Yours very truly,

R. B. WEST

Vice President.

Enclosure

EXHIBIT C

Board of Governors of the Federal Reserve System
Washington

[Seal]

Address Official Correspondence to the Board

February 14, 1942

Mr. W. A. Day, President,
Federal Reserve Bank of San Francisco,
San Francisco, California.

Dear Mr. Day:

Reference is made to the application of the Peoples Bank of Lakewood Village, California, which has not yet been authorized to commence business, for membership in the Federal Reserve System. The Board has carefully considered the information accompanying this application, together with such other information as it has been able to develop with regard to the application, and has requested me to advise you that it is unwilling to approve the application on the basis of the information now before it. Please advise the applicant accordingly.

Very truly yours,

CHESTER MORRILL

Secretary [35]

EXHIBIT D

February 20, 1942

Board of Governors of the
Federal Reserve System
Washington, D. C.

Re: Membership Application, Peoples
Bank, Lakewood Village, California.

Dear Sirs:

We have just been informed of your action rejecting our application for membership in the Federal Reserve System.

With the thought that a request for reconsideration might possibly be in order, we respectfully direct your attention to the fact that major developments in defense industries adjacent to our proposed location have brought about a need for banking facilities that is far more urgent than when our application for membership was filed with you. There have been some changes made in our stock ownership, and in order that you may be informed of our current position, we wish to advise you that the 1000 shares of stock formerly held by the West Coast Securities Company have been sold to the following individuals who are prominent and well-known residents of Long Beach and immediate vicinity. These shares have been paid for from their own funds.

Clark J. Bonner	200 shares
Ralph B. Clock	200 shares
Chas. B. Hopper	200 shares
Harold R. Pauley	200 shares
Victor W. Hayes	200 shares

Messrs. Bonner, Clock and Hopper, original sponsors of this project, are no doubt dealt with in the report which is before you.

Harold R. Pauley, Vice President of the Petrol Corporation, Los Angeles, California, owns an additional 100 shares of our stock and has replaced his brother, Edwin W. Pauley, on our Board of Directors. Edwin W. Pauley finds it necessary to spend nearly all of his time in Washington. Mr. Harold R. Pauley has an estimated net worth of \$300,000.00.

Mr. Victor W. Hayes, 3519 E. Second Street, Long Beach, California, is a pioneer citizen of Long Beach, is retired from active business and receives a substantial income from oil and rentals.

For your information, we have attached a copy of a new list of our stockholders.

In the light of the above information, we respectfully request that you reconsider our application for membership.

Yours very truly,

PEOPLES BANK

E. B. MARTIN,

Vice President

EXHIBIT E

Federal Reserve Bank of San Francisco

February 21, 1942

Air Mail

Board of Governors of the
Federal Reserve System,
Washington, D. C.

Dear Sirs:

As requested in the Board's letter of February 14, 1942, we have informed the Peoples Bank of Lakewood Village, California, that the Board is unwilling to approve its application for membership in the Federal Reserve System on the basis of the information now before it, and a copy of our letter to the bank is enclosed.

We have now received a letter, dated February 20, 1942, addressed to the Board of Governors by the Peoples Bank, Lakewood Village, requesting the Board's reconsideration of the bank's application, and submitting the additional information that 1,000 shares of its stock originally subscribed for by the West Coast Securities Company has been purchased by and issued to other individual stockholders in equal amounts of 200 shares each.

The above mentioned letter is enclosed without comment or recommendation, but with the request that the Board inform us by wire of its conclu-

sions with respect to the bank's request for reconsideration of its application.

Yours very truly,

R. B. WEST

Vice President.

Enclosures

EXHIBIT F

Federal Reserve Bank of San Francisco

March 11, 1942.

Airmail

Mr. E. B. Martin,

Vice President, Peoples Bank

Lakewood Village,

Los Angeles County, California.

Dear Mr. Martin:

With further reference to your letter of February 20, addressed to the Board of Governors of the Federal Reserve System, requesting reconsideration of your application for membership in the Federal Reserve System, and our telephone conversation of today, we are requested to inform you that the Board of Governors will be glad to reconsider your application upon a definite showing by the directors of your bank—

1. That arrangements have been made by Mr. John S. Griffith, San Marino, California, for financing the purchase of his stock in a manner different from that in effect at the time of our investigation of your bank's application for member-

ship, and that such arrangements are consistent with the other provisions of this letter.

2. That some change has been made in the arrangements for the use of the furniture and fixtures whereby the bank will be under no obligation to Capital Company or any other part of the Transamerica group.

3. That neither Transamerica Corporation nor any organization affiliated or closely identified with Transamerica Corporation or any other bank holding company group has any interest, direct or indirect, in the applicant bank, and that the bank is in no manner obligated to any such organization.

4. That all stockholders have stated in writing that they have no agreements or understandings, expressed or implied, with respect to the sale or transfer of the stock of the bank to any such organization, and that they do not intend to enter into any such agreements or understandings.

5. That the bank was organized as a bona fide local, independent institution, and is expected to be continued as such.

In furnishing the information requested, it will be appreciated if it will be prepared in duplicate, and, upon its receipt, the material will be forwarded to the Board of Governors for its approval.

Yours very truly,

R. B. WEST

Vice President.

EXHIBIT G

Peoples Bank
Lakewood Village, California

April 23, 1942.

Mr. R. B. West, Vice President
Federal Reserve Bank of San Francisco
San Francisco, California

Dear Mr. West:

Replying to your letter of March 11, 1942, we are enclosing all in duplicate:

1. Statement by John S. Griffith relative to the re-financing of the purchase of his stock to meet the first requirement in the Reserve Board's proposal.

2. Copy of Declaration made by all of our directors which deals with Section 2, 3 and 5 of the Reserve Board's proposal.

3. Statement by all of our stockholders to comply with Section 4 of the Reserve Board's proposal.

We wish to offer, as an explanation, the information that at the time Mr. Armstrong made his field examination, a proposal had been made to us by a representative of the Bank of America to loan us some used fixtures, counters, etc., to fit out a temporary location. At that time we were disposed to accept their offer, however, when these used and quite obsolete counters and fixtures were installed some time later, we received a bill dated January 7, 1942, their job No. 4766 from the Capital Company, totaling \$1,104.90 covering the purchase and installation of this equipment. We propose to pay this bill and, consequently, we do not

feel that we are in any way obligated as a result of this transaction.

We shall appreciate your dispatching this information to the Reserve Board in Washington by air mail, requesting a reply by wire. The writer will communicate with you by telephone when this material has reached your desk to determine whether or not it will meet your requirements.

Yours respectfully,

E. B. MARTIN

E. B. Martin

Vice President

Enclosures

EXHIBIT H

Board of Governors of the Federal Reserve System
May 6, 1942.

Board of Directors,
Peoples Bank,
Lakewood Village, California

Gentlemen:

The Board of Governors of the Federal Reserve System approves the application of the Peoples Bank, Lakewood Village, California, for stock in the Federal Reserve Bank of San Francisco, effective if and when the bank is duly authorized to commence business by the appropriate State authorities, subject to the numbered conditions hereinafter set forth:

1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the per-

mission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

2. The net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

3. Such bank shall not engage as a business in issuing or selling either directly or indirectly (through affiliated corporations or otherwise) notes, bonds, mortgages, certificates, or other evidences of indebtedness representing real estate loans or participations therein, either with or without a guarantee, indorsement, or other obligation of such bank or an affiliated corporation.

4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such

bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System.

In connection with the foregoing conditions of membership, particular attention is called to the provisions of the Board's Regulation H regarding membership of State banking institutions in the Federal Reserve System as amended effective November 20, 1939, with especial reference to section 6 thereof. A copy of the regulation is enclosed.

The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status.

If at any time a change in or amendment to the bank's charter is made, the bank should advise the Federal Reserve Bank, furnishing copies of any documents involved, in order that it may be determined whether such change affects in any way the bank's status as a member of the Federal Reserve System.

Acceptance of the conditions of membership contained in this letter should be evidenced by a resolution adopted by the Board of Directors and spread upon its minutes, and a certified copy of

such resolution should be filed with the Federal Reserve Bank. Arrangements will thereupon be made to accept payment for an appropriate amount of Federal Reserve Bank stock, to accept the deposit of the required reserve balance and to issue the appropriate amount of Federal Reserve Bank stock to the bank.

The time within which admission to membership in the Federal Reserve System in the manner described may be accomplished is limited to 45 days from the date of this letter, unless the bank applies to the Board and obtains an extension of time. When the Board is advised that all of the requirements have been complied with and that the appropriate amount of Federal Reserve Bank stock has been issued to the bank, the Board will forward to the bank a formal certificate of membership in the Federal Reserve System.

The Board of Governors sincerely hopes that you will find membership in the System beneficial and the relationships with your Reserve Bank pleasant. The officers of the Federal Reserve Bank will be glad to assist you in establishing your relationships with the Federal Reserve System and at any time to discuss with representatives of your bank means for making the services of the System most useful to you.

Very truly yours,

[Signed]

L. P. BETHEA

Assistant Secretary.

Enclosure

EXHIBIT I

Federal Reserve Bank of San Francisco

May 7, 1942.

Airmail

Mr. E. B. Martin,
Vice President, Peoples Bank,
Lakewood Village, California.

Dear Mr. Martin:

We have been advised by the Board of Governors of the Federal Reserve System that the application of Peoples Bank for membership in the Federal Reserve System, and the right to subscribe for stock of the Federal Reserve Bank of San Francisco, has been approved, subject to the following conditions:

1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

2. The net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

3. Such bank shall not engage as a business in issuing or selling either directly or indirectly (through affiliated corporations or otherwise) notes, bonds, mortgages, certificates, or other evidences of indebtedness, representing real estate loans or participations therein, either with or without a guarantee, indorsement, or other obligation of such bank or an affiliated corporation.

4. If without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System.

Acceptance of the conditions of membership contained in this letter should be evidenced by a resolution adopted by the Board of Directors of your bank and spread upon its minutes. Three copies of a suggested form of such resolution are enclosed, two certified copies of which should be returned to this bank.

Following the adoption of the above resolution, payment for the appropriate number of shares of

stock of the Federal Reserve Bank of San Francisco will be in order, and should be made to the Los Angeles Branch, Federal Reserve Bank of San Francisco, Los Angeles, California, on the following basis:

Fifty per cent of a sum equal to six per cent of the paid-up capital stock and surplus of your bank as of the date upon which membership is accomplished, with instructions to charge your account for accrued dividends on the shares since date of payment of the last dividend.

If six per cent of the paid-up capital and surplus amounts to a sum not divisible by 100, the bank is required to hold one additional share of stock for any excess or fractional part of \$100.00.

Immediate notice of the amount of the charge to your account will be mailed to you, and when the next dividend is declared your account will be credited in an amount to cover the dividend for the full semi-annual period.

It will also be necessary for you to maintain an account with this bank which will be equal to 14 per cent of your demand deposits and six per cent of your time deposits. This will constitute your legal reserve deposit and may be maintained in excess of but not fall below the required percentage without incurring an interest penalty upon the deficiency at a rate fixed by the Board of Governors of the Federal Reserve System. The method of computing reserves is set forth in Federal Reserve Circular 130 and Supplement thereto, copies of which are enclosed for your guidance. Since prior

to commencing business your bank will have no deposits, it is suggested that you open an account with our Los Angeles Branch in sufficient amount to cover the reserve requirements of your anticipated deposits. The above payments may be made either by draft upon your Los Angeles correspondent, or by requesting any other correspondent to transfer the amount for your credit with our Los Angeles Branch, or by remittance of currency, or a combination of these methods.

The resolution adopted by your Board of Directors on November 28, 1941, authorizing membership, among other things, authorizes—that reports and information regarding your bank may be interchanged between the Federal Reserve Bank of San Francisco and State and Federal supervisory authorities having jurisdiction over your bank. In order that a copy of this resolution may be filed with the Superintendent of Banks, it will be appreciated if you will certify two of the three enclosed copies of such resolution, executing the agreement authorized therein, and return them with the other documents to be submitted in connection with your acceptance of membership.

We shall look forward to receiving notice of your acceptance of membership, and sincerely hope the affiliation will prove both beneficial and pleasant.

Yours very truly,

R. B. WEST

Vice President.

Enclosures

EXHIBIT J

APPLICATION FOR MEMBERSHIP IN
THE FEDERAL RESERVE SYSTEM

At a meeting of the Board of Directors, Peoples Bank, Lakewood Village, California, duly called and held on the twenty-eighth day of November, 1941, the following resolution was adopted:

“Whereas, it is the sense of this meeting that application should be made on behalf of this bank for membership in the Federal Reserve System in accordance with the provisions of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto; and

“Whereas, under the provisions of the Federal Reserve Act, such a bank applying for membership in the Federal Reserve System is required to subscribe for stock in a Federal Reserve bank in a sum equal to six per cent of the paid-up capital stock and surplus of such applying bank;

“Now, therefore, be it resolved, That the President or Vice President and the Cashier or Secretary of this bank be and they are hereby authorized, empowered, and directed to make application for and to subscribe to the appropriate number of shares, of a par value of \$100 each, of the capital stock of the Federal Reserve Bank of San Francisco, as determined on the basis of the capital stock and surplus of this bank as of the date upon which its membership in the Federal Reserve System becomes effective; to pay for such stock in

accordance with the provisions of the Federal Reserve Act; to agree for and in behalf of this bank that, upon admission to membership in the Federal Reserve System, it will comply with all the requirements of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant to law which are applicable to State banks and trust companies which become members of the Federal Reserve System; and to agree for and in behalf of this bank that reports and information regarding this bank may be interchanged between the Federal Reserve Bank of San Francisco and all State or Federal supervisory authorities having jurisdiction of this bank."

I hereby certify that the foregoing is a true and complete copy of a resolution duly adopted by the Board of Directors of this bank at a meeting thereof held on the date specified, at which a quorum was present, and that such resolution has not been amended or repealed and is still in full force and effect.

W. M. PARKER

Secretary or Cashier

Peoples Bank, Lakewood Village, California

Pursuant to the foregoing resolution, the Peoples Bank, Lakewood Village, California, hereby makes application for the appropriate number of shares of the capital stock of the Federal Reserve Bank of San Francisco, of a par value of \$100 each, as determined on the basis of the capital stock and sur-

plus of this bank as of the date upon which the membership of this bank in the Federal Reserve System becomes effective; agrees to pay for the same in accordance with the provisions of the Federal Reserve Act; agrees that, upon its admission to membership in the Federal Reserve System, it will comply with all the requirements of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant to law which are applicable to State banks and trust companies which become members of the Federal Reserve System; and agrees that reports and information regarding this bank may be interchanged between the Federal Reserve Bank of San Francisco and all State or Federal supervisory authorities having jurisdiction over this bank.

Peoples Bank, Lakewood Village, California.

By E. B. MARTIN

Vice President

EXHIBIT K

Peoples Bank
Lakewood Village
California

May 12, 1942.

Mr. R. B. West, Vice President
Federal Reserve Bank of San Francisco
San Francisco, California

Dear Mr. West:

We are returning, properly executed, two copies of Resolution of Acceptance and two copies of Ap-

plication for Membership which was originally filed November 28, 1941.

Thanking you for your splendid co-operation, we are

Your respectfully,

E. B. MARTIN

E. B. Martin

Vice President

Inclosures

EXHIBIT L

APPLICATION FOR MEMBERSHIP IN THE FEDERAL RESERVE SYSTEM MADE BY PEOPLES BANK

Lakewood Village, Los Angeles County, California

This application and all exhibits should be forwarded, in duplicate, to the Federal Reserve Agent at the Federal Reserve bank of the district in which the applying institution is located.

Application and exhibits should be fastened together at the top of the page only. In so far as practicable, all exhibits should be furnished on sheets of the same size as this page.

This cover sheet (Form 83) should accompany any application for membership on Forms 83A, 83B, or 83C.

APPLICATION FOR MEMBERSHIP IN THE FEDERAL RESERVE SYSTEM

At a meeting of the Board of Directors, Peoples Bank, Lakewood Village, Los Angeles County,

California, duly called and held on the 28th day of November, 1941, the following resolution was adopted:

“Whereas, it is the sense of this meeting that application should be made on behalf of this bank for membership in the Federal Reserve System in accordance with the provisions of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto; and

“Whereas, under the provisions of the Federal Reserve Act, such a bank applying for membership in the Federal Reserve System is required to subscribe for stock in a Federal Reserve bank in a sum equal to six per cent of the paid-up stock and surplus of such applying bank;

“Now, therefore, be it resolved, That the President or Vice President and the Cashier or Secretary of this bank be and they are hereby authorized, empowered, and directed to make application for and to subscribe to the appropriate number of shares, of a par value of \$100 each, of the capital stock of the Federal Reserve Bank of San Francisco, as determined on the basis of the capital stock and surplus of this bank as of the date upon which its membership in the Federal Reserve System becomes effective; to pay for such stock in accordance with the provisions of the Federal Reserve Act; to agree for and in behalf of this bank that, upon its admission to membership in the Federal Reserve System, it will comply with all the requirements of the Federal Reserve Act and the regulations of the Board of Governors of the Fed-

eral Reserve System made pursuant to law which are applicable to State banks and trust companies which become members of the Federal Reserve System; and to agree for and in behalf of this bank that reports and information regarding this bank may be interchanged between the Federal Reserve Bank of San Francisco and all State or Federal supervisory authorities having jurisdiction of this bank.”

I hereby certify that the foregoing is a true and complete copy of a resolution duly adopted by the Board of Directors of this bank at a meeting thereof held on the date specified, at which a quorum was present, and that such resolution has not been amended or repealed and is still in full force and effect.

W. M. PARKER

Secretary or Cashier

PEOPLES BANK

(Legal name of applying bank)

Lakewood Village, Los Angeles County, California,

Pursuant to the foregoing resolution, Peoples Bank, Lakewood Village, Los Angeles County, California, hereby makes application for the appropriate number of shares of the capital stock of the Federal Reserve Bank of San Francisco, of a par value of \$100 each, as determined on the basis of the capital stock and surplus of this bank as of the date upon which the membership of this bank in the Federal Reserve System becomes effective; agrees to pay for the same in accordance with the provisions of the Federal Reserve Act; agrees that,

upon its admission to membership in the Federal Reserve System, it will comply with all the requirements of the Federal Reserve Act and the regulations of the Board of Governors of the Federal Reserve System made pursuant to law which are applicable to State banks and trust companies which become members of the Federal Reserve System; and agrees that reports and information regarding this bank may be interchanged between the Federal Reserve Bank of San Francisco and all State or Federal supervisory authorities having jurisdiction of this bank.

The following exhibits are attached to and made a part of this application:

Exhibit I. Two copies of a certified statement of condition of the bank as of November 28, 1941. (The statement of condition is to be of a current date and, in so far as practicable, in the form appearing on the face of the latest form of report of condition submitted by State member banks to the Board (Form 105) and shall be supplemented by a statement of any contingent liabilities and any assets not shown by its books.)

Exhibit II. Two copies of the report of the latest examination of the bank made by State banking authorities. (The applying bank may, if it desires, request the State Bank Supervisor to forward the copies direct to the Federal Reserve bank.)

Exhibit III. Two copies of all letters of criticism, if any, received from the State banking authorities in connection with the two latest reports

of examination and two copies of replies thereto. (If no replies have been made, a statement should be submitted in duplicate, showing what action has been taken by the bank with respect to the criticisms and requests of the State banking authorities.)

Exhibit IV. Two copies of the charter (certificate of authority to commence business and articles of incorporation of this bank with all amendments to date certified by the appropriate State official. (If applicant has been involved in a consolidation whereby all rights, franchises, and interests of constituent institutions pass by operation of law to the consolidated bank, information should be furnished, in duplicate, as to any corporate powers acquired by the bank by virtue of such consolidation other than those shown in its charter or articles of incorporation.)

Exhibit V. Two copies of a statement of powers or functions that have been or are now being exercised or performed other than those usual to commercial banking. (Full details should be given, in duplicate, if applicant acts directly or indirectly in any fiduciary capacity, insures or guarantees real estate titles, underwrites fidelity bonds or acts as surety, conducts an insurance business, deals in, sells, or distributes stocks or securities to dealers or to the public, sells real estate mortgages, or participations therein, with or without guarantee, conducts a real estate rental or brokerage business, or performs any other functions not necessarily incidental to commercial banking.)

Exhibit VI. (a) Two copies of a list of all

branches, branch offices, agencies, or receiving stations showing with respect to each the location, date established, volume and nature of business transacted, and reference to the provisions of State law covering the establishment and operation of the branch.

(b) Two copies of any approval or authorization of the establishment of each branch or agency by State authorities required by State law.

Exhibit VII. Two copies of all agreements executed within the preceding five years, if any, with respect to waiver or restriction of deposits, subordination of deposits, or contributions involved in any rehabilitation or reorganization of the bank with a statement of the amounts involved at the time of each agreement and any subsequent modification of the agreements or repayments. If any agreements of the kinds described were executed prior to the preceding five years and as a result of which the bank is still obligated or subject to a claim of any kind, full information, in duplicate, regarding any such agreements should also accompany the application.

[Seal]

PEOPLES BANK

(Legal name of applying bank)

Lakewood Village,

Los Angeles County,

California

By E. B. MARTIN

President or Vice President

Attest:

W. M. PARKER

Secretary or Cashier

Note: If six per cent of the capital and surplus amounts to a sum not divisible by 100, the bank should apply for one additional share of stock for any excess or fractional part of \$100.

When determining the appropriate amount of the subscription for stock in the Federal Reserve bank, the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation should be included with the capital stock and surplus of the institution, but the amount of capital notes and debentures sold to others should not be included.

In the case of a bank which has set up a reserve for dividends payable in common stock, whether in connection with the retirement of preferred stock, capital notes, or debentures, or otherwise, such reserve shall be regarded as surplus for the purpose of determining the amount of Federal Reserve bank stock which the bank is required to hold, provided such reserve has been established pursuant to a resolution of the board of directors of the bank involved, will become a part of the permanent capital of the bank and will not be used for any other purpose than the issuance of dividends, payable in common stock.

Peoples Bank
Lakewood Village, California

STATEMENT OF CONDITION AS OF
NOVEMBER 28, 1941

ASSETS:

Due from Other Banks—Demand.....	\$125,000.00
Other Assets	None
<hr/>	
Total Assets	\$125,000.00

LIABILITIES:

Capital Stock	\$100,000.00
Surplus	25,000.00
Other Liabilities	None
<hr/>	
Total Liabilities	\$125,000.00

(Should be signed by at least three directors, and the cashier or treasurer. If the signing directors and officer have any reservation as to any of the clauses in the certificate, an explanation similarly signed should be attached to this sheet.)

CERTIFICATE OF DIRECTORS
AND CASHIER

We, the undersigned directors and officer of the Peoples Bank of Lakewood Village, Los Angeles County, California, certify, to the best of our knowledge and belief, that Exhibit I, attached hereto, contains a true and complete statement of

the condition of this bank on the date specified; that such statement includes all of the assets and liabilities of the bank; that the capital stock is unimpaired (this clause does not apply to mutual savings banks); and that the supplemental information submitted with and made a part of the application of this bank for membership in the Federal Reserve System is true to the best of our knowledge and belief.

E. B. MARTIN

E. B. Martin

WALTER EVERTS, JR.

Walter Everts, Jr.

O. D. ADY

O. D. Ady

W. M. PARKER

W. M. Parker,

Cashier

Note: Type name under each signature.

CERTIFICATE OF COUNSEL FOR FEDERAL RESERVE BANK

I, the undersigned, counsel for the Federal Reserve Bank of San Francisco, do hereby certify that, in my opinion, the Peoples Bank, Lakewood Village, Los Angeles County, California, is legally qualified, under its charter and the laws of the State of California, wherein it was incorporated, to purchase and hold stock in the Federal Reserve Bank of San Francisco, and to comply with the requirements of the Federal Reserve Act and the regulations of the

Board of Governors of the Federal Reserve System made in pursuance thereof, and that its attached application for membership in the Federal Reserve System is in due and proper form. Having made the necessary examination of such application and the accompanying papers which have a bearing on any legal matters involved and the State laws covering the organization and operation of this bank, I am satisfied as to the legal matters involved, except as otherwise noted.

ALBERT C. AGNEW

Counsel

Remarks: Cash capital paid in \$100,000. Population of Lakewood Village (unincorporated) estimated by Examiner L. B. Armstrong after visit to location 3500--4000 (X-Letter 4397). License to transact business withheld by Superintendent of Banks until membership in Federal Reserve System is perfected.

ALBERT C. AGNEW

Note: Inappropriate parts of the counsel's certificate should be marked out when it has been determined whether the bank is authorized to purchase stock in the Federal Reserve Bank or, in the case of a mutual savings bank or similar institution, to make the required deposit in lieu of a purchase of stock.

EXHIBIT M

Federal Reserve Bank of San Francisco

May 14, 1942.

Mr. E. B. Martin,
Vice President, Peoples Bank
Lake Village, California

Dear Mr. Martin:

Receipt is acknowledged of your letter of May 12, 1942, in which you enclose two certified copies of Resolution adopted May 12, 1942, by your Board of Directors accepting the conditions of membership in the Federal Reserve System as outlined in our letter of May 7 and the letter of the Board of Governors dated May 6, 1942.

Receipt is also acknowledged of two copies of Resolution adopted by your Board of Directors on November 28, 1941, authorizing application for membership in the Federal Reserve System and subscription to the capital stock of the Federal Reserve Bank of San Francisco and also authorizing the interchange of information regarding your bank between the Federal Reserve Bank of San Francisco and all state or federal supervisory authorities having jurisdiction with regard to your bank.

As outlined in our letter of May 7, 1942, it will be necessary for you to make payment for your subscription to the capital stock of the Federal Reserve Bank of San Francisco and open your reserve account with the Los Angeles Branch and to receive from the State Superintendent of Banks

authorization to commence business before membership in the Federal Reserve System will have been completed.

Yours very truly,

R. B. WEST

Vice President.

EXHIBIT N

Federal Reserve Bank of San Francisco

May 14, 1942.

Mr. E. B. Martin, Vice President

Peoples Bank

Lakewood Village, California

Dear Mr. Martin:

We acknowledge receipt of your letter of May 12, 1942, with enclosures as stated, and also confirm our telegram of today advising that the membership of Peoples Bank has been completed and becomes effective May 15, 1942.

Confirmation of your remittances to our Los Angeles Branch has been received, and there will be mailed to you a receipt for the payment on capital stock of the Federal Reserve Bank of San Francisco in a separate letter pertaining to routine matters and relations as a member bank, with which you will also be supplied with copies of regulations promulgated by the Board of Governors of the Federal Reserve System and circulars issued by the bank.

There is enclosed, for your information and guidance, a copy of Form F. R. 105a, "Instructions for the Preparation of Reports of Condition", also a copy of "Investment Securities Regulation", effective on and after July 1, 1938, issued by the Comptroller of the Currency, the provisions of which extend to State member banks.

As stated in the letter you received from the Board of Governors of the Federal Reserve System, a formal certificate of membership will be issued and mailed to you from Washington, D. C.

We trust that your membership may prove of mutual benefit, and that you will feel free to use the facilities made available thereunder.

Yours very truly,

R. B. WEST

Vice President.

Enclosures

EXHIBIT O

Federal Reserve Bank of San Francisco

May 15, 1942.

Peoples Bank

Lakewood Village, California

Dear Sirs:

We are charging your reserve account today, as separately advised, \$83.47 to cover the accrued dividend on your Federal Reserve bank stock for the period from the date of our last dividend, December 31, 1941, to May 15, 1942 (the date your

membership is effective), at one-half of 1% per month. When the next dividend is paid on this stock, it will cover the period from the date of our last dividend, December 31, 1941, to the date of such dividend.

As a member of the Federal Reserve System, your bank becomes subject to the terms of the Federal Reserve Act, and the ruling of the Board of Governors of the Federal Reserve System. That you may have available reference, we are forwarding you today under separate cover the following:

1. Binder containing a complete set of the current circulars issued by the Federal Reserve Bank of San Francisco. As these circulars are intended to acquaint member banks with the operations of the Federal Reserve Bank of San Francisco, it is suggested that you have those concerned review them carefully. Additional copies will be furnished upon receipt of your request.

2. Copy of the Federal Reserve Act, as amended.

3. Current set of regulations of the Board of Governors of the Federal Reserve System.

4. Two Hyalac Decalcomania window signs. These signs indicate membership of a bank in the Federal Reserve System and are copies of the official symbol indicating membership. They may be easily applied to window glass or other smooth, greaseless surface (wood, if filled).

Please acknowledge receipt of the circulars, regulations and copy of the Federal Reserve Act on the form enclosed therewith. We are also requesting

our Los Angeles Branch, with which you will be affiliated, to forward you the following:

1. Current edition of Federal Reserve Inter-district Collection Pamphlet and supplement to date.

2. Forms ST 11A for furnishing our Los Angeles Branch semimonthly condensed reports of your reserve condition. As a member bank you will be required to maintain on deposit with this bank, a reserve balance equal to 14% of your demand deposits and 6% of your time deposits, cash in your own vault and balance due from other banks not counting as reserve. The deposit liability is to be compiled in accordance with the formula given in Supplement 1 to Circular 130 and the report on Form ST 11A is to be mailed to our Los Angeles Branch on the 15th and last day of each month.

3. Index to symbols describing entries on statement and advice letter.

4. Two cards for signatures of your signing officers to be filed in duplicate with our Los Angeles Branch.

The names of your signing officers should be typed or plainly written on the left side of the face of the card and the signature affixed on the right side. The back of the card should be completed similarly for those tellers or others (not officers) who may have limited authority to sign on behalf of the bank. Please designate the capacity and extent of the signing authority of those other than officers authorized to sign. The num-

ber of those authorized to sign should be indicated in the space provided and the card should be dated and signed in the lower right corner by an officer.

5. Three copies of BD 2, Form of Resolution to be passed by your Board of Directors authorizing your officers to rediscount with or borrow from this bank on your own promissory note, and general pledge agreement. One executed copy of this resolution should be forwarded to our Los Angeles Branch and one to this office, the third copy may be retained for your file.

Any further information that you may desire relative to the Federal Reserve System or the operations of this bank as they relate to your bank, will be cheerfully furnished either by the Los Angeles Branch or by this office.

Please accept our best wishes for your success as a member of the Federal Reserve System.

Yours very truly,

R. T. HARDY

Assistant Cashier.

[Endorsed]: Filed May 31, 1944.

[Title of District Court and Cause]

MOTION TO DISMISS OF HENRY F. GRADY,
FEDERAL RESERVE AGENT

Comes now the defendant Henry F. Grady, Federal Reserve Agent, by his undersigned attorneys,

and respectfully moves this Honorable Court to dismiss this cause for the following reasons:

I.

FOR LACK OF JURISDICTION

(a) This Court lacks jurisdiction in this cause because necessary and indispensable parties defendant are not and cannot be joined as parties defendant in this cause, namely, the members of the Board of Governors of the Federal Reserve System in their official capacity as such.

(b) This Court has no jurisdiction herein over the defendant Board of Governors of the Federal Reserve System since it is an administrative agency of the United States Government, and may not be sued in absence [67] of Congressional consent, which is lacking; but if it may be sued, which is not admitted, it can only be sued in the District of Columbia where, by law, it has and maintains its official habitat.

(c) If plaintiff relies upon diversity of citizenship as a ground of jurisdiction in this cause, there is not a complete diversity of citizenship between plaintiff on the one hand and all the defendants on the other hand, in that plaintiff Peoples Bank is a corporation organized under and it is a citizen of the State of California and this defendant is also a citizen of the State of California, by reason of which this Court has no jurisdiction on the ground of diversity of citizenship.

Premises considered this defendant prays that this cause be dismissed for lack of jurisdiction.

II.

Subject to the above motion, this defendant moves this Court to dismiss this cause

FOR FAILURE TO STATE A CLAIM UPON
WHICH ANY RELIEF CAN BE GRANTED

(a) Plaintiff correctly alleges in its bill of complaint that the condition number 4, of which it complains and upon which this suit is predicated, was prescribed and required by the Board of Governors of the Federal Reserve System. Such bill of complaint affirmatively and correctly shows that such condition was not prescribed and required by this defendant, Henry F. Grady, Federal Reserve Agent.

While plaintiff's bill of complaint alleges that this defendant in his capacity as Federal Reserve Agent maintains, under regulations by the Board of Governors of the Federal Reserve System, a local office of said Board on the premises of the Federal Reserve Bank of San Francisco, and acts as an official representative of said Board for the performance of the functions conferred upon it by the Federal Reserve Act in the Twelfth Reserve District, such bill of complaint wholly fails to set out what functions, if any, are conferred upon this defendant by the Federal Reserve Act or otherwise in connection with the subject matter of this suit, namely, condition number 4 complained of by plaintiff, and wholly fails to set out what functions, if [68] any, this defendant, in such capacity is performing or attempting or threatening to per-

form in violation of any legal right of plaintiff.

This Court judicially knows that neither the Federal Reserve Act nor any rule or regulation promulgated by the Board thereunder anywhere confers any power or authority or places any duty, even ministerial, upon this or any Federal Reserve Agent in connection with or in any manner relating to the subject of admitting State banks to or excluding them from membership in the Federal Reserve System or prescribing conditions to such membership or in the matter of terminating or forfeiting such membership after such has been acquired; and if this defendant, as such Federal Reserve Agent, actually did intend to take proceedings predicated upon such condition number 4 to enforce same and to deprive plaintiff herein of its membership in the Federal Reserve System, as plaintiff has alleged, and which this defendant denies, he is and would be entirely powerless to accomplish such a result.

This defendant refers to and makes a part hereof, the same as if expressly written herein, his affidavit filed herein in support of this motion.

(b) The subject matter of this suit is whether the Board of Governors of the Federal Reserve System acted without lawful authority in admitting a certain State bank to membership in the Federal Reserve System upon the condition that if, during the existence of such a membership, a certain holding company affiliate and certain others, allied or affiliated with it, should acquire any stock in the applicant bank, without the prior consent of the

Board, such bank would withdraw its membership from the System within sixty days after notice from the Board so to do. Such condition, complained of, on its face shows that it is not self executing and the membership of the plaintiff State member bank in the Federal Reserve System is not automatically terminated upon the acquisition of stock by any of the corporations or others described. On the other hand, under the very terms of the condition pleaded and complained of, the most that could happen, but which plaintiff does not allege has happened, is that the Board, if it should determine to do so, could notify the plaintiff bank to withdraw from membership in such System. Should such notice at any time in the future be given by the Board, plaintiff bank, by the terms of the condition, has sixty days thereafter within [69] which to comply or refuse to comply. Should it, after sixty days, refuse to withdraw its membership in the System, the matter could end there with the bank continuing as a member bank; or, if not, and should the Board then consider the question of terminating the membership of such bank, it is required, under Section 327 of Title 12 U.S.C.A., to give such bank a hearing, which necessarily implies a hearing under due process of law, before it may or does determine to require such bank to surrender its stock in the Federal Reserve Bank and forfeit its rights and privileges of membership after all of this occurs, if it does, and not until then has the plaintiff exhausted the administrative remedy available to it

and which it is required to do before it may resort to any court for any relief.

Premises considered this defendant, Henry F. Grady, Federal Reserve Agent, respectfully moves this Honorable Court to dismiss this cause as to him in such capacity because plaintiff's bill of complaint fails to state a claim upon which any relief can be granted herein.

FRANK J. HENNESSY

United States Attorney, Southern Division of the
Northern District of California, Post Office
Building, San Francisco, California.

W. E. LICKING

Assistant United States Attorney, Post Office Building
San Francisco, California.

J. P. DREIBELBIS

Board of Governors of the Federal Reserve System,
Washington, D. C.

GEORGE B. VEST

Board of Governors of the Federal Reserve System,
Washington, D. C.

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER

NETH L. LEACHMAN

Of Counsel, 505 Republic Bank Building, Dallas,
Texas.

W. E. LICKING

Of Counsel

Attorneys for Defendant F. Gray, Federal Reserve
Agent. [70]

NOTICE OF MOTION

To: Peoples Bank, the plaintiff above named, Messrs. Sanner, Fleming & Irwin and John Amos Fleming, 5658 Wilshire Boulevard, Los Angeles, California, and Messrs. Willkie, Owen, Otis, Far & Gallagher, and Carl M. Owen, 15 Broad Street, New York City, its attorneys.

You, and each of you, will please take notice that the undersigned will bring the foregoing motion to dismiss plaintiff's complaint on for hearing before this Court in the Court Room of the Honorable Michael J. Roche, Judge of the above entitled Court, located in the Post Office Building, at 7th and Mission Streets, in the City and County of San Francisco, State of California, on the 19th day of June, 1944, at 10 o'clock a.m., of said day or as soon thereafter as counsel can be heard.

[Dated]: Dallas, Texas, May 26th, 1944.

NETH L. LEACHMAN

Attorney for Defendant Henry F. Grady, Federal Reserve Agent.

[Endorsed]: Filed May 31, 1944. [71]

[Title of District Court and Cause]

AFFIDAVIT OF HENRY F. GRADY, FEDERAL RESERVE AGENT, IN SUPPORT OF HIS MOTION TO DISMISS

District of Columbia—ss.

Before me, the undersigned authority, a Notary Public in and for the District of Columbia, on this day personally appeared Henry F. Grady, who after being by me duly sworn did under oath depose and say:

My name is Henry F. Grady. I have been for many years and am now an inhabitant and citizen of the City and County of San Francisco, State of California. I am Chairman of the Board of Directors of the Federal Reserve Bank of San Francisco, San Francisco, California, and also am Federal Reserve Agent. In my capacity as Federal Reserve Agent, I am joined as a defendant [72] in the above styled and numbered cause. My duties as Federal Reserve Agent are all prescribed by statute, and in such capacity I have no duties which are not so prescribed.

I am not now and never have been the agent of the Board of Governors of the Federal Reserve System for service of process in any court or other proceeding. I am not now and never have been authorized by law or otherwise to accept and never have accepted at any time service of process for and on behalf of the Board of Governors of the Federal Reserve System.

As Federal Agent, I have not had anything whatsoever to do with and do not have any power, authority or duty in connection with the admission or refusal of state banks to membership in the Federal Reserve System or with the termination or forfeiture of such membership after admission. As Federal Reserve Agent, I have had nothing whatsoever to do with the admission of Peoples Bank of Lakewood Village, California, to membership in said System. As Federal Reserve Agent, I had nothing whatsoever to do with the prescribing of the conditions of membership in said System required of or agreed to by said Peoples Bank. As Federal Reserve Agent, I could not and do not intend to have anything to do with the question as to whether or not any of the conditions of membership have or have not been violated. As Federal Reserve Agent, I have taken no position and do not intend to take one with reference to whether or not Peoples Bank of Lakewood Village, California, shall or shall not continue to be a member of the Federal Reserve System. The condition of membership, of which plaintiff herein complains, was prescribed solely by the Board of Governors of the Federal Reserve System. The Board did not seek or have my advice or recommendation thereon. As Federal Reserve Agent, or otherwise, I have not had and do not now have any authority to make, alter or revoke the condition complained of by plaintiff, or any authority to exercise any discretion, or even ministerial function, in the enforcement of it. The Board of Governors of the Federal

Reserve System under sections 321 and 322 of Title 12 of the United States Code, has the sole and exclusive authority to admit or exclude state banks from membership in the Federal Reserve System; and such Board, and not a Federal Reserve Bank or a Federal Reserve Agent, has the exclusive power and authority to prescribe conditions, rules and regulations pertaining thereto, and after a hearing such Board, and it alone, has the power to require [73] such state member bank to surrender its stock in the Federal Reserve Bank and to forfeit all rights and privileges of membership in such Federal Reserve System.

I, as Federal Reserve Agent, have never intended to have or take any part in any proceedings, if any there be, predicated upon condition number 4, complained of by plaintiff herein, for the purpose of depriving plaintiff of its ownership of shares of the Federal Reserve Bank of San Francisco and of membership in the Federal Reserve System. Should the Board seek to enforce said condition (and this is a matter concerning which I have no knowledge whatsoever) I, as Federal Reserve Agent, would have nothing whatsoever to do with such enforcement or any part thereof.

Witness my hand this the 13th day of May, 1944.

HENRY F. GRADY

Subscribed and sworn to before me this the 13th day of May, 1944.

[Seal]

O. E. FOULK

Notary Public in and for
the District of Columbia

Commission Expires May 14, 1945.

[Endorsed]: Filed May 31, 1944. [74]

[Title of District Court and Cause]

PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AGAINST THE DEFEN-
DANT FEDERAL RESERVE BANK OF
SAN FRANCISCO

Comes now the plaintiff, Peoples Bank, by its undersigned attorneys and respectfully moves this Honorable Court for summary judgment against the defendant, The Federal Reserve Bank of San Francisco, on the ground that the pleadings, motions, admissions and affidavits on file in this action show that there is no genuine issue as to any material fact, and that said defendant, The Federal Reserve Bank of San Francisco, has no defense sufficient in law.

[Dated]: July 28, 1944.

SANNER, FLEMING & IRWIN
WILKIE, OWEN, OTIS,
FARR & GALLAGHER

By JOHN AMOS FLEMING

Attorneys for Plaintiff [75]

NOTICE OF MOTION

To: The Federal Reserve Bank of San Francisco
and to Albert C. Agnew, its attorney, Federal
Reserve Bank Building, San Francisco, Cali-
fornia:

You and each of you will please take notice that the undersigned will bring the foregoing motion for summary judgment against the defendant, The Federal Reserve Bank of San Francisco on for hearing before this Court, in the court room of the Honorable Michael J. Roche, Judge of the above entitled Court, located in the Post Office Building, at Seventh and Mission Streets, in the City and County of San Francisco, State of California, on the 21st day of August, 1944, at the hour of 10:00 A.M. of said day, or as soon thereafter as counsel can be heard.

Dated: At Los Angeles, California, July 28, 1944.

SANNER, FLEMING & IRWIN
WILLKIE, OWEN, OTIS,
FARR & GALLAGHER

By JOHN AMOS FLEMING
Attorneys for Plaintiff

[Endorsed]: Filed July 31, 1944.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT OF DE-
FENDANT FEDERAL RESERVE BANK
OF SAN FRANCISCO AND IN SUPPORT
OF PLAINTIFF'S MOTION FOR SUM-
MARY JUDGMENT.

AFFIDAVIT OF W. M. PARKER

State of California

County of Los Angeles—ss.

W. M. Parker, being first duly sworn, deposes
and says:

That he is now and at all times since November
28, 1941, been Secretary and Cashier of the Peoples
Bank of Lakewood Village, California, the plain-
tiff herein.

That he has read the affidavit on file herein of
William A. Day, President of the Federal Reserve
Bank of San Francisco, one of the defendants
herein, and knows the contents thereof. That he
has examined the files of the Peoples Bank con-
taining all the correspondence, documents, papers
and other records having to do with the admission
of the Peoples Bank to membership in the Fed-
eral Reserve System in May, 1942. That in addi-
tion to the correspondence and other papers con-
tained in the affidavit of William A. Day, the files
and records of the Peoples Bank show the follow-
ing relevant and important papers: [78]

1. A copy of the typical statement in letter form

made by all the stockholders of the Peoples Bank to the Federal Reserve Bank pursuant to the requirement of paragraph 4 of the letter of the Federal Reserve Bank to the Peoples Bank of March 11th, 1942, (Exhibit F to the Day affidavit) is annexed hereto marked Exhibit 1. These letters bear date of March 23, 1942.

2. That a copy of the statement filed by the Directors of Peoples Bank pursuant to the directions of said letter of April 23, 1942 is hereto annexed marked Exhibit 2.

3. No proposed resolutions were enclosed or included in the letter of May 6th, 1942 from the Board of Governors to the Peoples Bank (Exhibit H of the Day affidavit). A true copy of the proposed resolutions which were included in the letter of the Federal Reserve Bank of San Francisco to the Peoples Bank, dated May 7th, 1942 (Exhibit I of the Day Affidavit) is annexed hereto marked Exhibit 3.

4. These resolutions in identically the same form so proposed were adopted by the Board of Directors of the Peoples Bank on May 12, 1942 and two certified copies thereof were mailed to the Federal Reserve Bank of San Francisco with a letter dated May 12, 1942, a copy of which is marked Exhibit K and attached to the affidavit of William A. Day on file herein.

I am informed and believe from copies thereof which have been furnished to me and which I have read that the following exchange of telegrams and correspondence has taken place:

On June 13th, 1944, Messrs. Willkie, Owen, Otis, Farr & Gallagher, attorneys for the Peoples Bank in this litigation, sent a letter to Mr. Albert C. Agnew of which a true copy is hereto annexed marked Exhibit 4. Thereafter under date of June 15th, 1944 the said Mr. Agnew, General Counsel of the Federal Reserve Bank of San Francisco, wrote a letter to Willkie, Owen, Otis, Farr & Gallagher in response to their letter of June 13th, [79] a true copy of which is hereto annexed marked Exhibit 5.

On July 7th, 1944 the said Messrs. Willkie, Owen, Otis, Farr & Gallagher addressed a telegram to said Mr. Albert C. Agnew, a true copy of which is hereto annexed marked Exhibit 6. In reply thereto Mr. Albert C. Agnew sent a telegram to Messrs. Willkie, Owen, Otis, Farr & Gallagher under date of July 7th, 1944, a true copy of which is hereto annexed marked Exhibit 7. On July 10th, 1944 Messrs. Willkie, Owen, Otis, Farr & Gallagher sent a telegram to Mr. Agnew, a true copy of which is hereto annexed marked Exhibit 8. On July 11th, 1944 Mr. Agnew replied to the said telegram of July 10, 1944, by telegram, a true copy of which is hereto annexed and marked Exhibit 9.

On July 11th, 1944 J. P. Dreibelbis, general attorney for the Board of Governors of the Federal Reserve System sent a telegram to Messrs. Willkie, Owen, Otis, Farr & Gallagher, a true copy of which telegram is hereto annexed marked Exhibit 10.

Further affiant saith not.

W. M. PARKER

Subscribed and sworn to before me this 19th day of July, 1944.

[Seal] JOHN A. FLEMING
Notary Public in and for the County of Los Angeles, State of California. [80]

EXHIBIT No. 1

March 23, 1942.

Federal Reserve Bank of
San Francisco,
San Francisco, California

Gentlemen:

I, the undersigned, being a stockholder of the Peoples Bank, Lakewood Village, California, do hereby state that I have no arrangements, expressed or implied, with respect to the sale or transfer of the stock of the Bank which I own to either the Transamerica Corporation, or any organization affiliated or closely identified with Transamerica Corporation, or any other Bank Holding Company group, and that I do not intend to enter into any such agreements or understandings.

Yours very truly,

.....

EXHIBIT No. 2

Peoples Bank
Lakewood Village, California

April 23, 1942

Federal Reserve Bank
San Francisco
California

Gentlemen:

We, the undersigned members of the Board of Directors of Peoples Bank, located at Lakewood Village, Los Angeles County, California, do hereby state as follows:

1. That the above mentioned bank is now organized as a bona fide local, independent institution, and is expected to be continued as such.

2. In view of the fact that the stockholders of the Peoples Bank have been asked to state in writing that they have no agreements or understandings, express or implied, with respect to the sale or transfer of the stock of the Peoples Bank to the Transamerica Corporation or any organization affiliated or closely identified with Transamerica Corporation or any other Bank Holding Company group, we assume that upon securing such signatures you will be satisfied that the matters set forth in your letter of March 11th, 1942, have been complied with.

3. That the furniture equipping our banking quarters was purchased direct from Barker Bros., Los Angeles, California, and that we are not now and never have been obligated to Capital Company

or any other part of the Transamerica group for the purchase of said furniture.

4. That the above-mentioned bank is not now, and never has been obligated in any way, except by direct purchase agreement, to Capital Company or any other part of the Transamerica group for the installation of mechanical equipment, fixtures and safes in its banking quarters, and that said purchase agreement will be paid in full, as soon as permission to operate has been given by the State Superintendent of Banks.

In Witness Whereof, we have affixed our hands and seals this 23rd day of April, 1942.

/s/ E. B. MARTIN

/s/ W. R. MARTIN

/s/ WALTER EVERTS, JR.

/s/ O. H. ADY

/s/ W. W. WERNER

/s/ RALPH H. CLOCK

/s/ CLARK J. BONNER

/s/ HAROLD R. PAULEY

/s/ CHAS. B. HOPPER

/s/ R. C. LEWIS

I, W. M. Parker, do hereby certify that I am the duly elected Secretary of Peoples Bank, located at Lakewood Village, Los Angeles County, California, and that the signers of the foregoing statements comprise the full membership of the Board of Directors of the above mentioned bank.

In Witness Whereof, I have attached my hand

and the seal of this Corporation this 23rd day of April, 1942.

[Seal]

/s/ W. M. PARKER
Secretary

EXHIBIT No. 3

RESOLUTION ADOPTED BY BOARD OF
DIRECTORS OF PEOPLES BANK, LAKE-
WOOD VILLAGE, CALIFORNIA

“Whereas, this bank, acting under resolution adopted by its Board of Directors, on November 28th, 1942, applied for stock in the Federal Reserve Bank of San Francisco, which application was on May 6, 1942, approved by the Board of Governors of the Federal Reserve System; and

“Whereas, such approval was expressly predicated upon acceptance and compliance by this bank with the following conditions, to-wit:

“1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

“2. The net capital and surplus funds of such bank shall be adequate in relation to the character

and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

“3. Such bank shall not engage as a business in issuing or selling either directly or indirectly (through affiliated corporations or otherwise) notes, bonds, mortgages, certificates, or other evidences of indebtedness representing real estate loans or participations therein, either with or without a guarantee, indorsement or other obligation of such bank or an affiliated corporation.

“4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica Group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System; and

“Whereas, the officers of this bank, under authority duly conferred upon them by this board, have accepted said conditions and in behalf of this

bank agreed to comply with the same and all thereof;

“Resolved, That this bank does hereby accept such stock in the Federal Reserve Bank of San Francisco and membership in the Federal Reserve System, subject to all of the foregoing terms and conditions of membership, and does hereby agree to comply and to continue compliance with the same and all thereof;

“Further Resolved, That the officers and employees of this bank are hereby strictly enjoined to observe and comply with all the aforesaid terms and conditions and to continue compliance therewith.”

(Minutes of May 12, 1942)

EXHIBIT No. 4

Willkie, Owen, Otis, Farr & Gallagher

15 Broad Street, New York

June 13th, 1944

Re: Peoples Bank v. Federal Reserve Bank of San Francisco, No. 23243R, In the District Court of the United States, Northern District of California, Southern Division.

Albert C. Agnew, Esq.

Counsel for the Defendant Federal Reserve Bank
in the above entitled case,

C/o Federal Reserve Bank of San Francisco.

Dear Sir:

In support of the motion made by the defendant

Federal Reserve Bank of San Francisco in the above entitled case, for a summary judgment, the affidavit of William A. Day, filed May 29, 1944, states, among other things (p. 9, line 30 et seq.):

“Affiant further avers that, in addition to lack of power, authority, jurisdiction and discretion regarding the taking of any proceedings, statutory, administrative, or otherwise, as to the enforcement of said condition No. 4, as hereinabove averred, defendant Reserve Bank, at none of the times hereinabove or in said complaint mentioned, has had, or now has, any such intentions,”

to wit,—as we understand it,—intention with respect to the taking of any proceedings, statutory, administrative, or otherwise, for the enforcement of such conditions.

In the Memorandum of Points and Authorities which you have served on us in support of said motion for a summary judgment, you state (p. 2 of your Memorandum):

“It (the Federal Reserve Bank of San Francisco) has never contended or asserted, nor does it now contend or assert that said condition is valid or enforceable against the plaintiff or that it is empowered to cancel plaintiff’s shares of stock in defendant Federal Reserve Bank of San Francisco, or to terminate plaintiff’s membership in the Federal Reserve System. It is without authority in law or other-

wise to take any proceedings whatever in that respect, and it does not intend to do so.”

For the purpose of clarifying the issues which will necessarily be presented to the Court in the hearing upon the motion, we respectfully ask the answer of the defendant Federal Reserve Bank to the following question, to wit:

assume that the Board of Governors of the federal Reserve System should give to the plaintiff, the Peoples Bank, the sixty-day notice which is provided for in said condition No. 4;

assume that, following the receipt of said notice, the Peoples Bank should refuse or neglect to take any action to withdraw from membership in the Federal Reserve System;

assume that the Board of Governors of the Federal Reserve System (predicating their action on said condition No. 4, and the failure or refusal of the plaintiff Peoples Bank to withdraw from membership in the Federal Reserve System following receipt by the Peoples Bank of the sixty-day notice provided for in condition No. 4 and purporting to act either under the authority of Section 327 of Chapter 3 of Title 12, U.S.C.A., or under any other claimed authority) should, after hearing or otherwise, issue an order or direction requiring the plaintiff, the Peoples Bank, to surrender its stock in the defendant Federal Reserve Bank of San Francisco and to forfeit all its

rights and privileges of membership in the Federal Reserve System, and that the Peoples Bank should refuse to comply with such order or direction by surrendering its stock or otherwise——

under these circumstances, does or does not the Federal Reserve Bank of San Francisco contend or claim that it is empowered to take any steps of any kind whatsoever, either with or without the direction or request of the Board of Governors of the Federal Reserve System, so to do, to terminate the ownership by the plaintiff Peoples Bank of its stock in the Federal Reserve Bank of San Francisco, together with the incidental benefits of membership in the Federal Reserve System.

We await a prompt response to this letter, which will be much appreciated.

Very truly yours,

(Signed) WILLKIE, OWEN, OTIS,
FARR & GALLAGHER

CMO:KM

EXHIBIT No. 5

Federal Reserve Bank of San Francisco

San Francisco 20, California

June 15, 1944.

Willkie, Owen, Otis, Farr and Gallagher

15 Broad Street,

New York, New York

Dear Sirs:

Re: Peoples Bank v. Federal Reserve
Bank of San Francisco, No. 23243R,
In the District Court of the United
States, Northern District of California,
Southern Division

Referring to your letter of June 13, 1944, based upon the entirely hypothetical state of facts recited therein, our answer is as follows:

The Federal Reserve Bank of San Francisco does not contend or claim but states the fact to be, predicated upon the law and the practice required thereunder, that it is not empowered to take any steps of any kind whatsoever, either with or without the direction or request of the Board of Governors of the Federal Reserve System so to do, to terminate the ownership by the plaintiff Peoples Bank of its stock in the Federal Reserve Bank of San Francisco or the benefits incidental to membership in the Federal Reserve System.

Upon notice from the Board of Governors of the Federal Reserve System that, after proper proceedings, the membership of a bank affiliated with

it has been terminated, the sole duty and function of the Federal Reserve bank so notified is to return to the member bank all property and funds of such member bank in the possession of the Federal Reserve bank to which the member bank is entitled, and this only at the explicit direction of the Board of Governors of the Federal Reserve System.

Yours very truly,

(Signed) ALBERT C. AGNEW

Albert C. Agnew

General Counsel

EXHIBIT No. 6

Western Union

July 7th, 1944

Albert C. Agnew, Esq.

Counsel for Federal Reserve Bank of San Francisco
San Francisco, California

For use on your Motion for Summary judgment in Peoples Bank case, will you kindly let us know the number of State banks in California that are members of the Federal Reserve System and whether any condition similar to condition No. 4 was imposed in connection with their joining the system. Also kindly ascertain and let us know whether such condition or any condition at all similar thereto was imposed upon any other State bank anywhere in the United States. If any such con-

dition was imposed upon any bank anywhere kindly give us the particulars.

WILLKIE, OWEN, OTIS,
FARR & GALLAGHER

EXHIBIT No. 7

Western Union

Fu283 54 — WUX San Francisco, Calif. 7 1158

1944 Jul 7 pm 3 08

Willkie Owen Otis Farr & Gallagher
15 Broad St NYK

There are nineteen State banks in California which are members of Federal Reserve System. Since remaining inquiries contained in your wire of this date are matters subject to sole jurisdiction of an peculiarly within knowledge of Board of Governors of Federal Reserve System your wire is being relayed to that Board for further attention—

ALBERT C. AGNEW

EXHIBIT No. 8

Western Union

July 10, 1944

Mr. Albert C. Agnew
Federal Reserve Bank Building
San Francisco, California

Retel not having heard from Federal Reserve

Board would appreciate if you would kindly inform us what the records of the Federal Reserve Bank of San Francisco show respecting the imposition of any condition similar to Number Four on the other eighteen State member banks

WILLKIE, OWEN, OTIS,
FARR & GALLAGHER
15 Broad St.
New York, New York

EXHIBIT No. 9

Western Union

1944 Jul 10 pm 7 24

FA475 30 — San Francisco Calif 10 401P

Willkie Owen Otis Farr & Gallagher

15 Broad St. NYK—

Retel date we are informed Board of Governors has advised you that information requested is confidential in character. We regret therefore that we are not at liberty to supply it—

ALBERT C. AGNEW

EXHIBIT No. 10

Western Union

AM55

1D110 52 2 Extra — 1D Washington DC 10 455P

Willkie Owen Otis Farr - and Gallagher—

15 Broad St NYK

Retel Agnew Federal Reserve Bank of San Fran-

cisco. Conditions of membership which the Board has considered necessary or advisable in particular cases are confidential and since information requested does not appear to be material to the issues involved in the motions before the court I regret I cannot furnish same—

J P DREIBELBIS

General Attorney Board of
Governors of the Federal
Reserve System

[Endorsed]: Filed July 31, 1944.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF WIL-
LIAM A. DAY IN SUPPORT OF MOTION
OF DEFENDANT FEDERAL RESERVE
BANK OF SAN FRANCISCO FOR SUM-
MARY JUDGMENT.

State of California,

City and County of San Francisco—ss.

William A. Day, being first duly sworn, testifies of his own knowledge as follows:

Affiant refers to his previous affidavit on file herein and hereby supplements the same in the following respects:

The previous affidavit refers to but does not have attached thereto, as exhibits, the following:

(1) Letter of advice dated February 20, 1942, addressed to plaintiff in which plaintiff was advised

that defendant Reserve Bank had been requested to inform plaintiff [95] that the Board of Governors was unwilling to approve plaintiff's application on the basis of the information then before the Board; a full, true and correct copy of said letter is attached hereto, marked Exhibit 1, and by such reference incorporated herein the same as if said letter were herein set out at length.

(2) Telegram dated May 6, 1942, addressed to affiant sent by defendant Board, signed by Bethea, Assistant Secretary of said defendant Board, in which affiant was advised, by code telegram, that the application of plaintiff for membership in the Federal Reserve System had been approved by said defendant Board subject to conditions; that a full, true and correct translation of said code telegram is attached hereto, marked Exhibit 2, and by such reference incorporated herein the same as if said telegram were herein set out at length.

(3) A full, true and correct copy of resolution of the board of directors of plaintiff bank accepting the conditions of membership imposed by defendant Board and agreeing to comply therewith, furnished the defendant Reserve Bank pursuant to defendant Board's letter dated May 6, 1942, which was intended to be attached as Exhibit J to affiant's previous affidavit, is attached hereto, marked Exhibit 3, and by such reference incorporated herein the same as if such resolution were herein set out at length.

Affiant avers that the form of such resolution is the form approved by defendant Board in every

case of acceptance of conditions of membership, by a state bank within the Twelfth Federal Reserve District desiring to become a member of the Federal Reserve System, since on or about December 8, 1933, and that such form, containing the agreement to comply with the conditions imposed, was the form acceptable to [96] defendant Board in admitting plaintiff to membership in the Federal Reserve System.

Affiant further avers that said resolution, and the whole and every part thereof, including the agreement to comply therewith therein contained, was not, nor is it now, a requirement of defendant Reserve Bank, imposed upon, or exacted of, plaintiff by this defendant as a condition to the issuance to plaintiff of capital stock in Reserve Bank, or as a condition attached to such stock when, as, and if, the same were issued, or as a condition attached to plaintiff's original subscription therefor which was subsequently canceled, as hereinafter averred, or as a condition attached to plaintiff's further subscription for such capital stock, which has not been fully paid for, as hereinafter averred, or otherwise.

Affiant states that said resolution was enclosed which defendant Reserve Bank's letter dated May 7, 1942, without any requirement whatever on the part of defendant Reserve Bank as to its adoption in exact terms, or otherwise; that, as stated by Reserve Bank in its said letter dated May 7, 1942, such resolution was simply a "suggested form" (Exhibit I, previous affidavit) which plaintiff might use if it were so advised.

Said resolution was prepared by defendant Reserve Bank and enclosed with its letter dated May 7, 1942, which letter was sent under instructions of defendant Reserve Board, in accordance with Reserve Bank's usual practice in like cases, with the intention of being helpful, and in order to expedite plaintiff's membership in the Federal Reserve System in view of the fact that Board's letter dated May 6, 1942, addressed to plaintiff, sent from Washington, D. C., to defendant Reserve Bank for transmittal to plaintiff, would not actually be received by plaintiff, in the ordinary course of mail, until several days after May 6, 1942. However, such suggested form [97] of resolution was adopted by plaintiff in the exact form as prepared by defendant Reserve Bank and was returned to Reserve Bank, without any protest or complaint whatever on the part of plaintiff, by letter dated May 12, 1942 (Exhibit K, previous affidavit), in which plaintiff thanked defendant Reserve Bank "for your splendid cooperation."

Affiant further avers that plaintiff is the owner and holder of 68 shares of the capital stock of defendant Reserve Bank, subject to the payment of one-half of the purchase price thereof, or the sum of \$3,400, when call is made therefor by defendant Board of Governors of the Federal Reserve System; that originally, and on or about the 15th day of May, 1942, plaintiff, as required by the provisions of section 9 of the Federal Reserve Act, as amended, and the regulations applicable thereto, subscribed for 75 shares of the capital stock of de-

defendant Reserve Bank, and plaintiff thereupon became the owner of such shares of capital stock, subject to the payment of one-half of the purchase price thereof, or the sum of \$3,750, on call of said defendant Board of Governors; that subsequently, and on or about the 16th day of March, 1943, such subscription was canceled to the extent of 7 shares of such capital stock on the application of plaintiff therefor, by reason of the fact that plaintiff's call report as of December 31, 1942, showed that the combined capital and surplus of plaintiff bank on that date was the sum of \$112,500 and that, under the law and regulations applicable thereto, plaintiff was only entitled to hold said 68 shares of the capital stock of defendant Reserve Bank, subject to call as aforesaid, instead of said 75 shares previously subscribed for; that ever since said 16th day of March, 1943, plaintiff has been, and now is, a stockholder of the defendant Reserve Bank, owning and holding said 68 shares of such capital stock, subject to call as aforesaid; that by reason of the foregoing affiant states that it is untrue, as alleged in plaintiff's complaint and as testified to by affiant in his previous affidavit, that 34 shares of the capital stock of defendant Reserve Bank were paid for by and/or were issued to plaintiff and/or that plaintiff is now the owner of said shares.

Affiant also avers that the examination or investigation of plaintiff bank, made by defendant Reserve Bank in connection with plaintiff's application for membership in the Federal Reserve System, was made by defendant Reserve Bank as the examining

agent of defendant Board at its direction, under its instructions, and pursuant to the provisions of sections 9 and 21 of the Federal Reserve Act, as amended (12 U. S. C. 325, 481). That the report of said examination was forwarded by defendant Reserve Bank to defendant Board, without any recommendation as to the granting of said application or otherwise, for the information of defendant Board in passing upon plaintiff's application for admission as a member of the Federal Reserve System.

Dated: San Francisco, California, October 4, 1944.

WILLIAM A. DAY

Subscribed and sworn to before me this 4th day of October, 1944.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires March 15, 1945 [99]

EXHIBIT No. 1

February 20, 1942

Peoples Bank,
Lakewood Village,
Los Angeles County,
California.

Dear Sirs:

Reference is made to your application for membership in the Federal Reserve System.

The Board of Governors of the Federal Reserve System has advised us that careful consideration has been given to the application, and we have been requested to inform you that the Board of Governors is unwilling to approve the application on the basis of the information now before it.

Yours very truly,

R. B. WEST

Vice President.

EXHIBIT No. 2

Federal Reserve Bank of San Francisco

Incoming Telegram

From: Board, Washington

To Mr. Day May 6, 1942 Federal Reserve Bank
of San Francisco

Wire No. 96. Time Filed: 611p. Time Received:
328p.

Application of Peoples Bank, Lakewood Village, California, for membership in the System has been approved by Board subject to conditions of membership numbered 1, 2 and 3 set forth in Board's Regulation H and the following special condition:

“4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indi-

rectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationship, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

Please advise such bank of Board's approval and conditions of membership prescribed, together with necessary instructions as to procedure for accomplishing membership. In addition to the usual comments the letter to the bank Will include the following:

"The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status."

Letter containing detailed advice regarding such approval will be forwarded bank through you as soon as possible. Upon receipt of certified copy of resolution of board of directors of such bank

accepting conditions of membership prescribed by Board and advice of compliance with said special condition required to be complied with prior to admission to membership, together with the advice of Counsel for the Federal Reserve Bank that such conditions have been properly accepted, the Federal Reserve Bank is authorized to take such action as may be necessary to complete admission of applying bank to membership. Please wire Board through use of code word FAZKE the same day membership of bank becomes effective and forward copy of resolution accepting conditions of membership together with copy of advice of compliance with said special condition to be complied with prior to admission and copy of opinion of Counsel for the Federal Reserve Bank that all conditions prescribed have been properly accepted by bank.

BETHEA

EXHIBIT No. 3

RESOLUTION ADOPTED BY BOARD OF
PEOPLES BANK, LAKEWOOD VILLAGE,
CALIFORNIA

“Whereas, this bank, acting under resolution adopted by its Board of Directors, on November 28, 1941, applied for stock in the Federal Reserve Bank of San Francisco, which application was on May 6, 1942 approved by the Board of Governors of the Federal Reserve System; and

“Whereas, such approval was expressly predicated upon acceptance and compliance by this bank with the following conditions, to-wit:

“1. Such bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, and, except with the permission of the Board of Governors of the Federal Reserve System, such bank shall not cause or permit any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership.

“2. The net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, and its capital shall not be reduced except with the permission of the Board of Governors of the Federal Reserve System.

“3. Such bank shall not engage as a business in issuing or selling either directly or indirectly (through affiliated corporations or otherwise) notes, bonds, mortgages, certificates, or other evidences of indebtedness representing real estate loans or participations therein, either with or without a guarantee, indorsement, or other obligation of such bank or an affiliated corporation. [104]

“4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any

holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System; and

“Whereas, the officers of this bank, under authority duly conferred upon them by this board, have accepted said conditions and in behalf of this bank have agreed to comply with the same and all thereof;

“Resolved, That this bank does hereby accept such stock in the Federal Reserve Bank of San Francisco and membership in the Federal Reserve System, subject to all of the foregoing terms and conditions of membership, and does hereby agree to comply and to continue compliance with the same and all thereof;

“Further Resolved, That the officers and employees of this bank are hereby strictly enjoined to observe and comply with all the aforesaid terms and conditions and to continue compliance therewith.”

CERTIFICATE

At a meeting of the board of directors of Peoples Bank, Lakewood Village, Los Angeles County, California, duly called and [105] held on the 12th day of May, 1942, the foregoing resolution was

duly offered, seconded and adopted. I hereby certify that the foregoing is a full, true and correct copy of such resolution passed by the board of directors of this corporation on the date specified and that the same has not been repealed, amended, or modified.

Dated this 12th day of May, 1942.

[Seal] W. M. PARKER

Secretary or Cashier Peoples Bank, Lakewood Village, California

[Endorsed]: Filed Oct. 4, 1944. [106]

CERTAIN PARTS OF THE REPORTER'S
TRANSCRIPT FOR OCTOBER 9, 1944
AND OCTOBER 10, 1944 [107]

Mr. Owen: Your Honor, I thought I would be through with practically everything within an hour, in answer to all these motions; at least, I hope so. However, I may take more than that, but I hope I will not do so, your Honor.

The Court: The reason I was inquiring about time, I did not know but possibly you wished to get away, and I wanted to be helpful.

Mr. Owen: Thank you very much. I have ample time now, as I said this morning. I wouldn't want to stint the gentlemen on any time they desire.

The Court: Very well.

Mr. Agnew: Your Honor, I would imagine that

the motions to dismiss filed by the Board of Governors of the Federal Reserve System and the Federal Reserve Agent, and the Federal Reserve Bank of San Francisco could be argued somewhat as a unit. I should judge an hour to an hour and a half in time on those would be sufficient.

Mr. Owen: Mr. Agnew, would you think it orderly for you to argue your motion for summary judgment also as part of the full case, and then I could meet everything?

Mr. Agnew: Yes, I shall be glad to do that. [108]

I respectfully submit to your Honor that while it may be technically argued and it is technically true that a court of equity is not precluded from taking jurisdiction on the ground that a remedy sought is premature where it rests on something being done outside the orbit of the plaintiff, that is the remedy here is not one which may be initiated at this date by the plaintiff, but I respectfully suggest that 60 days will pass before any real danger could happen to the plaintiff, [109] and particularly in view of the plaintiff's position that this condition is void and outside of the Board's power, particularly in view of that condition, and within a 60-day period the plaintiff would be exercising the rights it had under the terms of the conditions, and I respectfully suggest that the action, if not technically premature, is at least in principle premature, and that the plaintiff in such a case as this should not be permitted to invoke the jurisdiction of this court before a wrong has been done, and before even if the alleged contemplated action were

taken there would be a 60-day period within which the plaintiff was entitled to a hearing before the Board. [110]

In order to demonstrate to your Honor, if I may, how far away from any damage to this plaintiff the present situation is, I want to quote the following from page 74 of their brief, which was put in their brief in an effort to show that under certain conditions the Federal Reserve Bank might do something to them regarding this condition of membership, the exercise of some function relative to the expulsion of this bank from membership and, therefore, that it might possibly be construed by the Court as a proper party. This is what they say:

“Assume that, under Condition No. 4, the Board gave the Peoples Bank notice . . . that the Board invoked the condition and called upon the Peoples Bank to withdraw from membership in the system.”

That is assumption No. 1.

“Assume that the Peoples Bank in that situation refused to withdraw. It is clear, we submit, that at that stage of events, neither the Board nor the Reserve Bank would have power, without further proceedings, to require the defendant Reserve Bank to purport to cancel the stock.”

That is undoubtedly so, because the law gives this plaintiff—in other words, if the Board of Governors sought to cancel this bank's membership it could only do it after the holding of an admin-

istrative hearing, and that is a long way down the line. That means it would have to conform to due process and the like. [111]

“Therefore, we assume that the Board would have to go further and would seek to proceed within the scope of section 327. . . . It is here that, in the last analysis, the defendant Reserve Bank comes in with a substantial amount of action required to be taken by it in the cancellation of the plaintiff’s stock . . . and in denying to plaintiff the privileges of membership.”

In other words, they say that assume that under Condition No. 4 the Board gives the notice, assume that under Condition No. 4 the Bank refused to comply with its own condition of membership, and withdraw; assume that after that happened the Board gives notice of an administrative hearing; assume that an administrative meeting is held and the Board comes to the conclusion the membership of this bank in the Federal Reserve System should be cancelled, then the Federal Reserv Bank of San Francisco would have something to do with it. What would they have to do? Plaintiff says we would have something to do with cancelling their stock. If that is true, it would be a ministerial act. If there were any stock outstanding and the Board of Governors ordered that stock cancelled and turned it over for cancellation to the Federal Reserve Bank, this act of cancelling would be a ministerial act, because the Act, itself, says, “It shall

be within the power of the Board after hearing to require such bank to surrender its stock in the Federal Reserve Bank and to forfeit all rights and privileges [112] of membership.”

Then the act says, “Whenever a member bank shall . . . be ordered by the Board of Governors, under authority of law, to surrender its stockholdings in a Federal Reserve Bank, all of its rights and privileges as a member bank shall thereupon cease and determine.” [113]

(Page 72, line 7 to 17, inclusive)

How the Federal Reserve Bank of San Francisco could have anything to do with the cancellation of membership other than the physical act under order of the Board of Governors I am unable to state. Mr. Leachman, in his argument, referred to the National War Labor Board case——

Mr. Owen: May I interrupt you a moment?

Mr. Agnew: Yes.

Mr. Owen: What do you have to say about the othtr acts that we specify on page 75 of the brief?

Mr. Agnew: Well, I am not reading your brief, counsel. You can refer to those matters. I am arguing, and I don't care to go afield at this time. If I think you are wrong on your argument I will answer you on rebuttal. [114]

May I call your Honor's attention to a statement in the plaintiff's brief. I think it is an absolutely conclusive statement showing this case is a moot case put up to this court for decision in advance of any injury. Counsel says on page 93 of his brief:

“One would naturally think that an agency

of the dignity, power, and resourcefulness of such a board, and one possessed of its vast facilities, would welcome an expeditious determination on the merits of the question submitted."

This is the part I wanted to call to your Honor's attention:

"... and it undoubtedly hopes that if these procedural questions are decided in its favor, it will forever submerge this controversy."

There is a statement emanating from plaintiff's counsel that the Federal Reserve Board hopes if we can get this motion to dismiss, or motion for summary judgment, sustained, that this controversy will be forever submerged. I submit, your Honor, that that shows conclusively that the action is an action set up merely for the purpose of testing the Board's jurisdiction at a time when that jurisdiction has not been invoked. [115]

Any other rule would make out of the licensing authority a legislative body in a position to get different types of agreements out of everybody, because when the man comes before a board, particularly such a great board as this Federal Reserve Board, and for his little bank down in Lakewood Village wants to get a bank at once, because there are 4000 people, with houses and a great industry there, he wants to get into the Federal Reserve System and have his bank insured so that people will deposit their money, and he goes before this Board and asks for a permit, and they say, "You

can only have it if you will take a condition like that.” Why, the applicant is helpless. Suppose he says, “No, that is invalid. You can’t impose that on me. I won’t have it.” What happens? As a practical matter, he just doesn’t get the permit, and the community doesn’t get a bank or banking facilities. It may not be compulsion or duress in a legal sense. In a practical sense it has every aspect of tremendous duress, and that is what happened in this case. His application was first turned down because he was supposed to have some connection with that bad boy, Transamerica, and when they became convinced that the connection with that boy had been severed and he no longer was tainted with association with that thing, they said, “Yes, you can have it now. You meet the conditions. But you [116] can only have it on condition that if that bad boy ever gets a single share of your stock you are out in the cold again, although by that time you are an operating bank and the community relies on these facilities and has been built up on the idea that you have banking facilities. You are out in the cold as a blacklisted bank.”

Your Honor, that is the kind of duress that exists practically always when an applicant for license goes before a licensing authority and is asked to take a condition that they have no right to impose. He is practically defenseless. He may think, “They won’t ever bother me or rise up to hit me,” but he has to take it, and in consequence, under the practical duress of the system, this Board of Governors say, if it saw fit, could impose one

condition as to Bank A and another condition as to Bank B, and so have not a system of orderly laws, conditions pursuant to the statute, and having to do with the things they were to look into, with the solvency of the bank, the character of its management, the adequacy of its financial structure, but having to do with whatever policy was from time to time adopted by the Board in the secrecy and privacy of its own board room in Washington.”

[117]

Well, now, Mr. Willkie had at least thought—of course, we are rather naive souls—we thought that if we made them party defendants, with a high sense of their duty to the banking world and to this plaintiff, they wouldn’t be technical, they would say, “This plaintiff bank is entitled to know where it is at, and we will voluntarily appear and waive, and so forth, and we will voluntarily appear so this thing can be settled. They are entitled to have it settled.” This little bank down at Lakewood Village is not engaged in any game between counsel, [118] or in trying to have little principles of law settled. It wants to know whether that condition is good or bad. [119]

I want your Honor to understand this as very crucial in the case. It does not make any real difference to us whether this Federal Reserve Board is held to be an inhabitant here. It does not make any real difference to us whether they, [120] in the desire to arrive at a quick determination of the merits, voluntarily appear. It does not make any difference to us whether they are a party to the

case, or not. When the complaint was first prepared we did not make them a party. It was largely with the idea that they might be willing to come in and have a determination of the matter on the merits and get it quickly decided that we concluded to make them a party defendant. [121]

They say, and I agree with them, I don't think they have got any authority to do anything unless they can proceed under 327 that I just read, and this says that if we have violated the provisions of 321 to 331, and I say that means valid conditions thereunder, they can, after hearing, require such bank to surrender its stock. [122]

We have got so far in the proceeding. What is going to happen with the bank here, and we are predicated on our thinking, your Honor, on the idea that this is an invalid condition and does not give any basis of authority of law, which they have to have for that order. What is this bank going to do? Is it going to carry out its part in getting us out of the system, or isn't it?

Now, I put that to Mr. Agnew in as clear language as I could put it, in view of the seemingly sweeping claims in his brief and the seemingly sweeping statements in the affidavit of Mr. Day that they didn't intend to do anything.

Why, your Honor, he didn't think of this. If he did, when he said that, he didn't honestly mean it, because his evasive answer to my question as to what they did do or would do in that day when, based upon condition No. 4, the Board had purported to terminate our membership—what did they

purport to do? Did they intend to cancel our stock and cease paying us dividends and prevent us from voting and refuse us discount [123] privileges when we came in? He didn't answer, and when yesterday he got around to this very crux of the case and seemed to make it turn on the purely ministerial act of writing the word "cancelled" on the book with respect to our stock, he was right at the guts of his case, and I asked him to deal with these other things. He has not answered them in the reply brief. He has had two months to get at the guts of that thing, and last Saturday I got something called a reply brief, and not a word on it, not a word on it, some little new additional trivial arguments, and some authorities that have no application, but not a word on this thing that goes to the very heart of this case.

The Court: We will take a recess, just for a few minutes.

(Recess.)

Mr. Owen: Your Honor, before recess I was dealing with the question of what the Reserve Bank in San Francisco, what things it would have to do in the event of an order made by the Board acting under 327 and 328, an order made by the Board predicated on condition No. 4, the order of the Board stating that we had violated sections 321 to 331 of the statute, and declaring our rights forfeited. Now, on our predication that Condition No. 4 is absolutely invalid, null and void, why, then the action of the Board of that kind would be abso-

lutely null and void. It would not be a guide or charter of authority of any kind to the Federal Reserve Bank here to do anything, and we want to know exactly what the bank's position would be in [124] the light of that clear argument of ours, and in the light of the sweeping claim that they didn't intend to do anything, and in Mr. Day's affidavit and in Mr. Agnew's brief we got an evasive answer.

So we specified at page 75 of our brief, and we proceeded on the theory that they would obey the voice of the master, that they would go ahead and do the things as if the order of the Board were a valid order. Now, if the Board issues a valid order that does not end the matter, your Honor. There are a lot of things the bank has to do. It cancels the stock if the offending bank does not turn it in. It ceases to pay dividends on the stock. It returns the bank's subscription money to the offending bank. It thereafter refuses to permit the offending bank to vote on its stock, and it refuses it all the valuable rediscount privileges, and automatically as a result of its losing that status as a stockholder of the Reserve Bank, the offending bank ceases to be an insured bank.

Now, we are confronted, we are confronted with those acts that this Reserve Bank will have to do in order to make effective an order of the Board under 327 after they have had a hearing and after our client has said, "We will not surrender our stock because your proceeding was absolutely invalid."

So, your Honor, we have a great mass of things they have got to do in making this condition effective. It does not make the slightest bit of differences whether they imposed it [125] or not. They have got to do a great many things to make it effective, and if it is invalid and we are confronted with the idea they may do those things, your Honor, all the declaratory judgment cases say that is just the time for a poor citizen confronted with this thing to come into court and ask for a declaration of where he stands under things of this kind. [126]

Now, your Honor, on that point of discretion, Mr. Agnew, in his first brief, squinted at the idea that there must be some element of discretion involved here, that this court couldn't really decide whether this thing was valid or invalid without looking into surrounding circumstances, without looking into the reasons why this condition was imposed, and he thought it was incumbent upon us to allege reasons, whatever they may have been, and then nullify the propriety of their reasons. In later points in his brief he tried to make it appear that [127] we didn't have a case under the removal of a cloud on title. He came around with this point, that this condition is either valid or invalid right on its face. We don't have to consider the things that motivated the Board. They either had authority to do it completely, or they had not, and more important still, more important still, your Honor, is the position taken by counsel for the Board that is the source of the authority for this condition. What do they

have to say about it? I am reading a quotation from pages 49 and 50 of their brief as follows:

“Plaintiff pleads that the Condition No. 4 is ultra vires, null and void in all respects; that the Board had no authority in law to prescribe or exact such condition”—that is a correct statement—“The condition is pleaded en haec verba. The Board’s power or authority to prescribe or exact this condition is or is not found in the law. It either has the power or it has not. If it has the power, no court can interfere with the exercise of it. If it does not have the power, the condition, as pleaded by plaintiff is null and void.”

Now, that is what they say. If they didn’t have the power, this condition, they say with us, is null and void.

“It is only necessary to read the condition to determine whether or not it has the power, since everyone is presumed to know the law. A mere reading of the condition [128] gives the answer whether or not it is a valid provision.”

I agree with that 100 percent. I agree with that. That condition, right on its face, is either good or bad, and, your Honor, it is just so inconceivably bad that I am sorry that I have taken so much of the time of the Court this morning and so much in my brief to try to demonstrate our conviction to that effect. [129]

Now, what is the next thing that is said? So much for the contract theory, your Honor, and so

much for the idea that the Board is an indispensable party.

“Well,” says Mr. Agnew, “you haven’t alleged particulars [130] as to irreparable damage,” and he springs on us as a nice little finding the Montgomery Ward case. Well, your Honor, this is a declaratory judgment suit, not an injunction suit. This is a declaratory judgment suit. We are not here seeking an injunction. We haven’t got any motion before you for an injunction. If we had a motion before you for an injunction the Montgomery Ward case would apply, and then on our motion papers, of course, not on our bill——

Mr. Agnew: Do I understand you to say in your argument you are not asking for an injunction?

Mr. Owen: Not at the present time, sure. We have an incidental prayer——

Mr. Agnew: You are asking that the Board and the Bank both be enjoined.

Mr. Owen: After the Court has declared——

Mr. Agnew: You are not asking for an injunction pendente lite?

Mr. Owen: I am not asking for an injunction pendente lite. I may do it after the Court has declared. We may not even ask it then, and we say so in our brief, your Honor.

I have perfect confidence that if this court declares that condition null and void heed will be given to that and we won’t need an injunction to prevent something being done, and if we find we are wrong we will come in with an affidavit on the

facts of the situation at that time, but this is a declaratory [131] judgment suit. We base the jurisdiction of the court on the idea that this is a declaratory judgment suit. We say in our briefs that we may or we may not pray for an injunction. That prayer for an injunction is one of the customary prayers thrown in at the end of practically every declaratory judgment complaint, and I have looked at lots of them. The Montgomery Ward case was a case where they wanted an injunction right now. [132]

The Court: Haven't you a right to a hearing as a matter of law?

Mr. Owen: After they have started a proceeding, to say, "You have violated the statute," we can't institute the proceeding. We can't do anything. I discussed with your Honor a little while ago what was involved in the hearings we would have when we get before them. There is the condition. There is the purchase of stock by Transamerica, no question of fact. The condition is invoked. They have given us the 60-day notice. What can we say? We can only say that this is a bad condition, your Honor. Is that a remedy? Suppose they say, "Well, we shall stick to our original. You can't go behind us. There is no way of getting around us. We just stick." Is there any appeal from that? No, there is no appeal, nothing we can do about it. We are right back where we were before, and, of course, by that time we have a ruined bank, an absolutely ruined bank, while we are going through that process of the 60-day

notice, the pendency of the proceedings, the hearing, the final order. The only remedy we would have would be to come before some court and ask for declaration. That is not a remedy. [133]

For proper disposition of each of the motions before this Court, it may be assumed, for the sake of argument, that [134] that condition is invalid, and still the motions should be sustained. [135]

I would like to pose a question here, and I would like to [136] see what the answer would be. Suppose that this court, as a result of this hearing, would hold that the Board of Governors of the Federal Reserve System is not subject to its jurisdiction and should dismiss the suit as to the Board, and should likewise hold the same thing as to Mr. Grady, the Federal Reserve Agent, and should enter an order in compliance with the wishes and contentions of Mr. Owen, here, that the court has jurisdiction over the Federal Reserve Bank of San Francisco, and suppose that this Court should go on and later enter an injunction against the Federal Reserve Bank of San Francisco, enjoining that bank from doing anything that would in any manner fail to recognize the Peoples Bank of Lakewood Village as a member bank of the Federal Reserve System; then suppose that the Federal Reserve System Board of Governors, acting within its statutory power, would serve notice on the Peoples Bank and say, "We want you to withdraw your membership." Then suppose the Peoples Bank would say, "I am not going to do it. I refuse to do it. You don't have the power to make me do

it." Suppose the Board would hold a hearing and under due process, after considering the matter, finally come up with the conclusion that they should be expelled from membership, and should enter an order to that effect, and then suppose the Board of Governors of the Federal Reserve System would notify the Federal Reserve Bank of San Francisco. There the bank would be, under an injunction from this court, saying that it must recognize it, and it also would [137] be under an order from the Board that they are no longer a member. Now, the officers of the Federal Reserve Bank of San Francisco would certainly be in a dilemma. They would be afraid not to go ahead and recognize it as a member, because they would be possibly subject to a contempt action by this court. On the other hand, under the law in this matter, they would be violating the direction and order of their superior in Washington if they continued to recognize them as a member.

Now, the law also provides that the Board of Governors of the Federal Reserve System may remove officers of this local bank from office. They can remove them——

Mr. Agnew: You mean of the Federal Reserve Bank.

Mr. Leachman: That is right, of the Federal Reserve Bank, they can remove the president, the vice-president, any of the officers. If they went one way they would be in contempt. On the other hand, if they went the other way, they would be out of a job and on relief, maybe.

That question illustrates forcibly to your Honor that the exclusive and sole jurisdiction in this matter of enforcing the condition lies in the Board of Governors of the Federal Reserve System, where it is placed by law. I don't believe that it can be argued that the Board cannot impose conditions of membership, because the act expressly gives it discretionary power to grant them, grant the memberships, and if a bank stands on its own bottom, and has its own peculiar problems, we don't think [138] it can be argued, or is argued that the Federal Reserve Act, or the Federal Reserve Bank of San Francisco can impose, in the first instance, or can strike down in the second instance a condition imposed by the Board. We think that only a court of competent jurisdiction can review an order of the Board, and then only when it is acting in excess of its authority and not within its discretionary power. [139]

Mr. Agnew: If your Honor please, I am going to tax your Honor's patience a very short time. There are one or two points I want to cover, but before doing so, for the purpose of the record, I would like to formally offer in evidence the affidavits which have already been filed in court, the affidavits of Mr. Day.

The Court: Is there any objection?

Mr. Owen: No objection. I presume Mr. Parker's affidavit [140] will be received also.

Mr. Agnew: I am not offering it.

Mr. Owen: I offer it.

Mr. Leachman: Do you want Mr. Grady's affidavit? I, like, you, thought they were before the Court.

The Court: Let them all go in, so there is no question about it. [141]

I was quite surprised, might say almost dumfounded, to hear counsel this morning say that really an injunction was not what they wanted. I have understood all the way through, from reading counsel's brief and from the pleading filed in this case, that an injunction was just exactly what they wanted.

Evidently, counsel does not believe in the efficacy of prayer; because the prayer of its complaint, in the third division, reads as follows: [142]

"That the defendants and each of them, and the officers, attorneys and agents of each of them, be permanently restrained from the enforcement of said condition, or from taking any steps predicated thereon to effieuate the cancellation of plaintiff's stock in defendent, Federal Reserve Bank of San Francisco, and the termination of plaintiff's membership in the Federal Reserve System."

I thought that was what plaintiff wanted. I thought that was one of the principal things they wanted, but now we are confronted at this late date with a statement by counsel, "Probably there is no imminent danger, probably there is no impending threat, or at least our position on that is weak, and therefore we will recede from the idea

that we do want an injunction and say 'Let us forget about the injunction.' What we want the Court to do really is to interpret our contract."

What would that result in, your Honor please? My friend, Mr. Leachman, described the situation in some harrowing detail with regard to the dilemma in which the Federal Reserve Bank of San Francisco would be placed if this court should hold that the condition imposed was invalid and must be ignored, and, of course, that would imply injunctive relief, and then the Board of Governors later on took action to cancel this membership and order the officers of the Federal Reserve Bank not to recognize plaintiff as a member and not to discount its notes or pay it interest on the stock which it holds in the Federal [143] Reserve Bank of San Francisco. Certainly, the position of the Federal Reserve Bank would be anomalous, to say the least. But we are now narrowed down to this proposition: "We don't want an injunction. It is very doubtful that the Board of Governors of the Federal Reserve System is before the court properly, but we do want the court to tell us, or tell somebody, what this condition means, and whether or not we have to obey it."

Well, if your Honor please, a mere reading of the provisions of the Federal Reserve Act to which I have referred, section 9, will show conclusively that the authority to grant membership emanates from the Board and from the Board alone, that the authority to impose conditions is in the hands of the Board and in the hands of the Board alone.

How this court, under those circumstances, could even word a decree which would be binding upon the Federal Reserve Bank of San Francisco, without the Board of Governors before it, is a mystery to me. I wish that counsel, during the course of his discussion, had taken up that form of decree, because I don't see how it could possibly be framed.

[144]

Mr. Agnew: That is exactly the argument our own Circuit Court of Appeals made in the Asiatic Case, in which they said that a decree against the inferior with the superior absent would be futile, because the superior could remove the inferior and make the decree a nullity.

Mr. Owen: In this particular case the superior can't remove the Federal Reserve Bank of San Francisco. It may remove some officers, but if we have a decree with respect to the Federal Reserve Bank of San Francisco it is a complete entity under the law and the Board of Governors can't remove it or do anything with it. I don't care how many officers they remove. If this court enjoins the Federal Reserve Bank of San Francisco from carrying out this invalid condition, it can deprive us of our membership in the Federal Reserve System, because we are a member of the Federal Reserve System only and solely by virtue of having stock in that bank. That is the only qualification necessary. That is the reason we are here, your Honor. This condition would be a condition that would take that stock away from us, and

if we can hold onto that stock and prevent this Federal Reserve Bank from depriving us of that stock, we are still members of the Federal Reserve System, and I don't care what the Board of Governors does, but I don't believe, I [145] don't believe, and I am astonished that it would be suggested that if this Court, in the exercise of the ample authority given to it by the declaratory judgment statute to ascertain the rights of aggravated parties against a subordinate, if this court ascertains that we have rights that we ought to know about this condition, that it is invalid, if the court merely says that, I don't—I don't know much or I don't much care about an injunction—I don't believe the Federal Reserve Board in Washington, or the bank, would act in contrariety to that decision. It is inconceivable.

The Court: You are very earnest about what you are saying. That is the reason I have this patience. Now, in the event I agreed with your view, would you outline the order this Court would make?

Mr. Owen: Your Honor, I have not seen the exact phraseology.

The Court: I am not asking for exact phraseology. I just want to get a general idea from you.

Mr. Owen: "This Court finds and determines that Condition No. 4 attached to the permit is null and void."

The Court: And basing it on what?

Mr. Owen: Basing——

The Court: Basing that order on what?

Mr. Owen: You have a declaratory judgment complaint before you. You have a notice to dismiss, the equivalent to a demurrer. You overruled that. Let us assume you overruled their motion, [146] your Honor. If they then want to go to trial on the merits, we can go on to a trial on the merits, of course. If they want to stand on the demurrer and say that there is no issue of law here, right on their motion you can enter that order. They made a motion. You can overrule that motion. They can answer it. We can go to trial. We are anxious to get to the merits. Suppose they say that there is no fact to try and that they will rest on their motion——

Mr. Agnew: Are you contending that such an order could or should be made against the Federal Reserve Bank alone?

Mr. Owen: Yes.

Mr. Agnew: That is all I want to know.

The Court: Then, if I follow you, the only one I need to concern myself about is the Federal Reserve Bank.

Mr. Owen: That is right. The only one you need necessarily concern yourself about.

The Court: Then I don't need to concern myself about whether it is an indispensable party, or not.

Mr. Owen: Oh, yes. It is it an indispensable party then I have no suit at all. [147]

The Court: Just a minute. How am I, from this record, to determine in the public interest what they may or may not have done?

Mr. Owen: Your Honor, he says it is a privilege, but privilege subject to the exercise by the Board of proper discretion.

Mr. Agnew: That is correct.

Mr. Leachman: That is right.

Mr. Licking: The court would also be reviewing the discretion of that Board when the Board is not before the court and may not be before the court, and before the Board has acted in the premises.

Mr. Owen: Well, if we are in the realm of discretion and we are asking the Court to rectify an abuse of discretion, why, the Board of Governors in Washington is an indispensable party. We don't contend otherwise.

Mr. Agnew: We are not in the realm of discretion. We are in the realm of speculation, as to whether or not they are going to do anything.

Mr. Owen: We are talking about their power to impose this condition.

Mr. Licking: You are asking the Court to hold, in the [148] absence of the Board, that the Board had abused their discretion, and I asked if that were not unusual and if there were any occasion or any cases warranting that.

Mr. Owen: Aren't you still talking about discretion in creating the condition?

Mr. Licking: No, the exercise of a discretion conferred by the statute.

Mr. Owen: In imposing a condition, because we haven't got to the point of doing anything under it.

Mr. Agnew: Until we reach that point we are in the realm of speculation.

Mr. Owen: We are not in the realm of speculation that this condition hangs over this bank and jeopardizes its condition, and under the law of declaratory judgments a man in that position does not have to wait six months or two years until some board sees fit to say, "We will or won't enforce that against you." He is entitled to come in and find out where he is at, to say, "This thing is hanging over my head and I want to know where I am at." Borehard has a whole paragraph and a lot of citations on the propriety and use of declaratory judgments to get a determination from the court that the Board in question had no power and no right. That is just exactly why we are here.

I want to come to the abuse of discretion. Maybe I don't read the English language, but Mr. Leachman in his brief said that a mere reading of that condition determined whether [149] it was valid or invalid. Now, your Honor, if any discretion is involved it would necessarily have to have a trial to see whether or not the facts were such. If that is discretionary you would have to have a trial to see whether or not the facts would justify the making of that kind of an order as an exercise of discretion. We would be coming in here and saying that was an abuse of discretion, and that there was an abuse of discretion for reasons A, B, C and D, and your Honor, assuming we are here or in the District of Columbia, and that was our contention, that they had abused their discretion and wanted the order declared null and void on that basis, we would allege A, B, C and D, that did not appear on the

fact of the condition as the facts which constitute the abuse, but Mr. Leachman says, and I agree with him, that they either had the power to impose that condition or did not. We are not dealing with discretion. We say they had absolutely no discretion to impose this condition.

When it comes to things going to whether the applicant bank has adequate capital, or not, and whether the proposed management has adequate experience, or not, and whether the history of the bank, in order to be admitted to deposit insurance, is good, they look into the history of the bank and those things. They are in the realm of discretion, you Honor. They have got to pass judgment on some facts, and if they say, "We don't think the capital of this bank is adequate and we admit them on condition that they put in \$50,000 more, or we don't think [150] this management is good because the president has had no experience, and we admit them on condition they get a president who has had some experience in banking," they are in the realm of discretion and nobody could come and upset that kind of a condition without showing abuse, but when they come along and say that this bank, which they have found to be satisfactory and within every standard laid down by the statute is all right and a perfectly good bank, perfectly entitled to admission, and will be admitted, it is in, and it has not any business to be in unless they found that everything is all right. It is in. Now, it has got to get out if a single stockholder, with one share, does what he has a perfect right to do, to

wit, sell that one share to Transamerica Corporation, that has a perfect right to buy that stock, and the object of this clause is not to help that little bank; oh, no, the object of this clause is, I now find, to enforce the Sherman Law against Transamerica. That is the first time I ever heard it, but I get a hint from Mr. Leachman that the object of that clause was to enforce the Sherman Law.

Mr. Leachman: I told you a month and a half ago that was in the picture. It is no surprise.

Mr. Owen: But not with respect to this particular bank. It is a surprise here. It was not in other situations. I am not making my argument on the basis of surprise, but on the basis that even if they have powers to enforce the Sherman Law against [151] Transamerica, that does not give them authority to drive this little bank out of the Federal Reserve System, when the bank is a sound bank, simply because Transamerica acquires one share in it, something that has no relationship to the bank, whatsoever, and something the bank had no control over and couldn't stop even if it knew about it, and in this particular case it didn't know anything about it.

Mr. Agnew: You are arguing now that the Board of Governors had no authority to impose this condition.

Mr. Owen: That is right.

Mr. Agnew: And you are arguing on a state of facts where the Board of Governors is no longer before this Court, because this Court has no jurisdiction over it.

Mr. Owen: I am arguing that since our complaint on this condition is based on an utter lack of power, that the Board is not an indispensable party.

Mr. Agnew: Will you tell me what the words "arbitrary, discriminatory, ultra vires, capricious, and unreasonable" mean in the complaint, if they don't mean that the Board of Governors exceeded its authority in imposing this condition?

Mr. Owen: I will tell you what they mean. They mean what I said at pages 42 to 45 of our brief.

The point, your Honor, Point 2 of our brief, is that not only is the condition invalid for lack of authority, and I didn't have to go any further than that, your Honor, but it is [152] also invalid because it is arbitrary, unreasonable, unjust, and because it is discriminatory. Now, I tell you that this Board has no power to create a discriminatory condition, and I am coming to the point that Mr. Leachman made on that.

True, he says we can have particular conditions in particular banks. Not every bank is like every other bank, true. They can say to Bank A, "You can't come in unless you add \$50,000 to your capital," and they can say to Bank B, "You can come in without adding anything to your capital." Well, is that discriminatory? No, your Honor, if there is some general principle back of that applicable to all banks, and those are the other conditions in particular cases, but if they seek to establish a condition that is not applicable to every bank, that is a discriminaory condition, and it is just as

invalid as if they had no power to create conditions at all. They have got no power to create discriminatory conditions or capricious or arbitrary conditions. The law is clear on that.

In the Manhattan General Equipment Company case in 297 U. S. 129, the Supreme Court said:

“And not only must a regulation in order to be valid be consistent with the statute, but it must be reasonable.”

It can't be discriminatory. That is ABC law. There is no discrimination if the same principle is applied to everybody, but if that same principle is not applied by this Board to all banks, if it admits 2465 State banks to the system without [153] any word about any of their stock being held by a holding company, and then picks out Mr. Peoples' Bank and says, “You can't be in the system if Transamerica gets one share of stock,” they have got no power to do that. It is not an abuse of discretion. They just can't do it. That is just what they sought to do here. They have admitted California State banks into the system since the lawsuit was started. Why should they discriminate in favor of that bank against the Peoples Bank? They can't do it. It is utterly beyond their power. It is not an abuse of discretion at all. They are, therefore, not an indispensable party.

Mr. Licking: May I ask one question?

Mr. Owen: Certainly.

Mr. Licking: What about the argument that the statute, with a provision for administrative hearing, contemplates the possibility that the Board, if

it has made a mistake, should be given an opportunity to rectify its mistake before the court on this bare record attempts to rectify it for them in heir absence?

Mr. Owen: Mr. Licking, I argued that at some length this morning.

Mr. Licking: If it has been presented, pardon my interruption.

Mr. Owen: It has been argued. I don't think it is necessary to go over it again. That provision here is not an administrative remedy. [154]

Now, your Honor, the form of the decree, which seemed to bother Mr. Agnew——

Mr. Agnew: No, I think it bothered the court. The court asked you the question.

Mr. Owen: You raised quite a question about the form of the decree we could have here.

The Court: You focused my mind on it. That is the reason I asked for it.

Mr. Owen: You went to great length and seemed to be bothered about it.

Let us assume we are at the end of the trial and you have overruled their motion and we are at the point of what kind of a decree your Honor could make in the situation. The only decree is a declaration that this condition is null and void. We are content with that.

The Court: I must have something of substance to base that on. That is what is bothering me.

Mr. Owen: The substance is an invalid condition, which we assert is invalid, and the bank says

it is going to support. It says it has nothing to do about it.

Mr. Agnew: What party on this side of the table has said that condition is valid or invalid? We are not concerned with this question.

Mr. Owen: This is all play we are having. I am choking in a vacuum. [155]

Mr. Licking: There is no question that if there was a mistake made then the administrative hearing should be allowed to come in there. We are taking no position on that, for that reason.

Mr. Owen: Your Honor, look at this array of counsel. Where do they stand? Is this condition valid or invalid. I challenge them. We are confronted with this monstrous condition. Why do I have to get up and argue whether it is valid or invalid? Let them say something about it.

Mr. Agnew: I will say something if you will come into a proper forum with a proper complaint and proper parties, and that question will be tested.

Mr. Owen: If you don't say it is invalid I have no controversy with you anywhere. I don't care what court you are in.

Mr. Licking: Do you want to create a controversy now when it is not created by the pleading?

Mr. Owen: The controversy exists.

Mr. Licking: What is there here to allow the court to say there is a controversy?

Mr. Owen: We allege in our complaint.

Mr. Licking: Outside of that, I say.

Mr. Owen: We are here on a motion to dismiss our complaint. We allege in our complaint that

the controversy exists. I think it is apparent it does, and in the case of *Waite v. Macy* the court said that from the condition of this kind he would assume [156] that it existed. The Supreme Court said that from conduct of this very kind it would assume that the controversy existed.

Your Honor, before this complaint was filed I looked at quantities of declaratory complaints that were sustained, and all you have to allege is that a present controversy exists.

Now, if we haven't got a present controversy, the way these gentlemen have been acting, I don't know what we have got. They may have no immediate intention to chop our head off with the axe, but we have certainly got a present controversy as to whether or not that condition is valid or invalid.

I do contend it is imminent. I do contend there is irreparable damage. I do contend we don't have an adequate—I mean an administrative—remedy, but all of those things are of no consequence, **and** since they are of no consequence under the authorities I did not bother your Honor with marshalling the facts.

We are here on demurrer to a complaint. Under the statute that is the proper form of pleading. It does not lie in our mouth to say we haven't any controversy. On this motion we have a controversy.

Mr. Licking: Between whom?

Mr. Owen: Between us and the Federal Reserve Bank of San Francisco, between us and Mr. Grady, between us and the Board. We don't have to have Mr. Grady and the Board. We do have the bank,

and we allege a controversy with them, and on our [157] motion that is admitted—I mean on your motion that is admitted for the purpose of argument.

Mr. Leachman: Mr. Owen, I hesitate to ask another question.

Mr. Owen: No, I want to meet all of them.

The Court: As far as I am concerned, you can stay another day if it will be helpful.

Mr. Owen: Your Honor, I greatly appreciate your patience.

Mr. Leachman: In connection with the statement you just made there, does the Court not only have the right by the decree—a Federal court of limited jurisdiction not only have the right but always have the duty, if there is a question about the Court having jurisdiction, to look into it himself, and he can look beyond the pleadings to affidavits or even the evidence, and witnesses, and make a search and inquire as to whether or not your cause of action is as pretended by your pleadings, or what it is in reality.

Mr. Owen: Not on a motion to dismiss, not on a motion to dismiss.

Mr. Agnew: How about a motion for summary judgment?

Mr. Owen: Yes, on a motion for summary judgment, but what do you say on a motion for summary judgment? On your motion for summary judgment you present the affidavit of Mr. Day, and what does Mr. Day's affidavit say?

Mr. Agnew: It says that the Federal Reserve Bank of San [158] Francisco had no power to impose the condition.

Mr. Owen: That is a question of law.

Mr. Agnew: It says the Federal Reserve Bank did not formulate the condition, that it was formulated by the Board and transmitted to the Bank without comment or recommendation——

Mr. Owen: It says this——

Mr. Agnew: Let me finish.

Mr. Owen: It says, “We had nothing to do with the imposition of the condition and the specification of facts”——

Mr. Agnew: Pardon me, counsel. It says that we have no intention of attempting to enforce the condition.

Mr. Owen: I am coming to that.

Mr. Agnew: And no power to enforce the condition.

Mr. Owen: I am coming to that. It says two things, and I dealt with that this morning. It says two things, “We did not have anything to do with the imposition of the condition,” and seeks to sustain it by the record of correspondence.

I don't think the facts are—our counter affidavits sustain that—but I don't care, I don't care. *Colorado v. Toll* and all these other cases, the *Nehr* case, the *Macy* case, all were cases in which the subaltern had nothing to do with the imposition of the regulation, so I don't care. That is wasted breath, your Honor, and wasted paper.

They say, "We don't have anything to do with the enforcement of the condition, making it stick, we don't have anything to do [159] with depriving this stockholder of our bank of his stock."

Now, that is what they say, and we don't intend to—now, whether they have any power to deprive us of our stock in the purported enforcement of Condition No. 4 is a question of law. They say, "Look at the law. We don't have any power." We assert they do. Mr. Day's affidavit adds nothing on that, and in so far as he says anything along that line, your Honor, it is a brief.

Now, I called attention on page 75 of my brief as to a lot of things they had to do in order to make this stick, and yesterday when Mr. Agnew was talking on that and I wanted him to deal with those, did he deal with them? No, he would not. I tried to get him to answer, as he is getting me to answer, and I am not afraid to answer, but he was afraid to answer. He wouldn't answer, but he has had a chance since to answer, because I have rubbed it in today. Has he answered? No, he has not answered, because he can't, your Honor.

If, purporting to act on Condition No. 4, this Board should do anything, and we don't think they can, but suppose they did, and finally said to the Federal Reserve Bank, "This Peoples Bank is no longer a member of the Board," and I am assuming that that is an invalid order, because based on an invalid condition, and we are recalcitrant about it, what is Mr. Agnew's bank going to do? He says, "We have nothing to do. Maybe we will

perform a ministerial act of writing 'Cancelled' on our books." Well, [160] that is something to do. That is important. Suppose we demand dividends on the stock. We are still stockholders. That invalid order is not good. Can they say, "You get no dividends"? Suppose we went some rediscount privileges. We are still a stockholder. Are they going to say, "No." Suppose we want to vote and they say "No"? And suppose they want to return to us our subscription, and we say "No, you have no right to return it"? And they insist and try to force it back on us. The only effective things that can be done would be to deprive this plaintiff bank of its stock in the Federal Reserve Bank of San Francisco and thereby deprive it of membership. The only effective things, the actual concrete acts, must be done by this bank, there is no *doubt it*.

Now, I put up to them what they did intend to do if we were confronted with what is inevitable if this is not stopped, if we were confronted with an order of the Board to get out and we said we wouldn't. I put up to them what we would do, because he had come along with very glorious and sweeping declarations of intent not to do anything, and of course he ducked, he didn't answer, he evaded. His answer was an admission that they would of course proceed to do those things which I have described as being done to carry out the invalid order of the Board. That is all there is in Mr. Parker's affidavit, and I am not afraid of Mr. Parker's. I am just perfectly content that

this case should be decided, your Honor, on a motion for summary judgment. [161] We made a counter motion, your Honor. Of course, I know that under the rules plaintiff is not supposed to make a counter motion until there has been an answer; but we are anxious to get this disposed of.

Mr. Agnew: You just threw it in for what it was worth.

Mr. Owen: No, I did not just throw it in for what it was worth. I threw it in with the idea that somewhere along the line this body of men would help us get a decision on the merits.

Mr. Agnew: You admit under the rules it is not permissible.

Mr. Owen: Certainly. I say so in my brief.

Mr. Agnew: You encumber the records of the Court by filing it.

Mr. Owen: Well, I have encumbered the record of the Court by talking fifteen minutes too long, more than I did with that little motion.

Have I answered all the questions you had in mind, Mr. Licking?

Mr. Licking: Yes. The situation is that the Court must assume that the Board will not rectify its own mistake and then assume they will act at some future time. Those two assumptions are basic to the relief you request.

Mr. Owen: No, it is not basic, because here is a condition hanging over our head causing us damage at the very present moment, and under the Declaratory Judgment statute we are entitled [162] to a declaration which relieves us from that peril.

Judge Birdzell calls my attention to the fact that I had argued that the Board had no power to make agreements. Of course, I was arguing that they had no power to make agreements under imposing conditions or granting permits to become members. Of course, they have power under other specific provisions to make agreements. I didn't argue that they had no power of any kind to make agreements, but that they have no power under this statute to make agreements and enforce agreements. They have power to impose valid conditions and to enforce valid conditions, but no other power.

Mr. Leachman: If they have the power to impose conditions, doesn't the bank agree to the conditions in getting the permits, if they impose conditions?

Mr. Owen: Of course, Mr. Leachman, there is a kind of tacit agreement, if they hadn't said anything more, but accepting the thing with the conditions, they couldn't do anything else. That doesn't mean anything, and the cases I cited this morning, the mere express agreement to comply, does not add any weight. You can't bind a permittee by getting an express agreement from him on an invalid condition. I think I have said enough.

I want to again express my appreciation of the patience of the Court. I don't think I have ever known a court that was so liberal to counsel, certainly not so liberal to me. [163]

[Endorsed]: Filed Oct. 19. 1944. [164]

[Title of District Court and Cause.]

ORDER OF MOTIONS

The motion of each of the defendants to dismiss: the motion of the defendant Federal Reserve Bank of San Francisco for Summary Judgment; the motion of the plaintiff Peoples Bank for Summary Judgment; and the motion of the defendant Federal Reserve Bank of San Francisco to strike plaintiff's motion for Summary Judgment and each and all of said motions having been heretofore submitted and the Court having read the pleadings and affidavits filed on behalf of the parties and having considered the arguments and briefs of counsel, the Court is of the view that the defendant Board of Governors of the Federal Reserve System is an indispensable party not properly before the Court and that the complaint does not state a claim for equitable relief or for declaratory Judgment within the Jurisdiction of this Court as to any of the defendants, as appears from the opinion filed herewith.

Each of the motions to dismiss and the motion of the defendant Federal Reserve Bank of San Francisco to strike plaintiff's motion for [165] Summary Judgment are therefore granted. The motion of the defendant Federal Reserve Bank of San Francisco for Summary Judgment is denied. The motion of the plaintiff Peoples Bank for Summary Judgment is denied.

Dated: November 17th, 1944.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Nov. 17, 1944. [166]

[Title of District Court and Cause]

OPINION

This is a suit by the Peoples Bank, a State banking corporation organized under the laws of the State of California, to annul and enjoin the enforcement of a condition of membership required by the Board of Governors of the Federal Reserve System as a prerequisite to granting plaintiff the right to become a member bank of the Federal Reserve System.

Following the jurisdiction allegations, and those identifying the parties, the complaint alleges (Par. IV) that on or about November 28, 1941, plaintiff, desiring to become a member of the Federal Reserve System, made application to the Board of Governors of the Federal Reserve System (hereinafter referred to as "the Board"), under the rules and regulations prescribed by the Board, for the right to subscribe to the stock of the Federal Reserve Bank of San Francisco (hereinafter referred to as "Reserve Bank"). On or about May 6, 1942, it is stated, the Board approved plaintiff's application for membership, subject to certain conditions, among which was the one complained of, numbered 4. This condition, it is stated, was as follows:

"4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including the Bank of America National Trust and Savings Association, [167] or any holding company affiliate

or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System.”

Plaintiff claims that this condition is “arbitrary, unreasonable, capricious, discriminatory, ultra vires and null and void in all respects” in that no power has been conferred upon the Board to exact such condition as a prerequisite to membership in the Federal Reserve System. It is then alleged (Par. V) that on or about May 7, 1942, the defendant Reserve Bank informed plaintiff that, as a condition to its subscription to stock in the Reserve Bank, it would be required by said bank to accept condition No. 4 and agree to comply therewith by resolution of its board of directors. On or about May 12, 1942, plaintiff, it is stated, “being desirous of acquiring the said stock” in the Reserve Bank and becoming a member thereof “and under the compulsion of the said requirement of said defendant,” accepted the condition and, by resolution of plaintiff’s board, agreed to comply therewith. Although the fourth paragraph of the complaint states that the condition of membership complained of emanated from the Board, it is alleged that it was “exacted”

of plaintiff by the Reserve Bank and that, in so doing, the Reserve Bank violated the obligation imposed upon it by statute to administer its affairs fairly and impartially and without discrimination against plaintiff.

It is alleged (Par. VI) that on or about February 17, 1944, without the assistance or prior knowledge of plaintiff, Transamerica Corporation became the owner of five hundred out of five thousand shares of the capital stock of plaintiff. It is stated, upon information and belief, that this acquisition of plaintiff's stock by Transamerica Corporation was without the written approval of the Board and falls within the purview of condition No. 4 "imposed upon plaintiff by defendant, the Federal Reserve Bank of San Francisco." Notice of this purchase of plaintiff's stock by Transamerica Corporation was given the Board by plaintiff on or about April 4, [168] 1944 (Par. VII). After stating that the defendants assert that the condition is valid and enforceable, it is alleged (Par. VIII), also upon information and belief, that the defendants intend to and will, unless restrained, take proceedings, predicated on condition No. 4, to deprive plaintiff of its stock in the Reserve Bank and its membership in the Federal Reserve System, to the irreparable damage of plaintiff and that such proceedings are imminent. The validity and enforceability of the condition is denied, and it is alleged that the condition, being void, constitutes a cloud upon plaintiff's title to its shares in the Reserve Bank. Alleging the existence of a justiciable controversy and the lack of

other adequate remedy, plaintiff asks this Court for declaratory relief, for a decree invalidating the condition and for temporary and permanent injunctive relief against the enforcement of the condition or the termination of plaintiff's membership in the Federal Reserve System. However, no application for an injunction pendente lite was made.

In opposition to the relief requested in the complaint, the following motions were filed: Board of Governors of the Federal Reserve System, motion to dismiss; Henry F. Grady, motion to dismiss; Federal Reserve Bank of San Francisco, motion to dismiss and, in the alternative, motion for summary judgment. In addition, plaintiff interposed a counter-motion for summary judgment against the defendant Reserve Bank. To this counter-motion, defendant Reserve Bank filed a motion to strike. This counter-motion will be stricken. It is clear that, under Rule 56a of the Federal Rules of Civil Procedure, a party seeking to recover upon a claim or to obtain declaratory relief may move for summary judgment in his favor only after a pleading responsive to the complaint has been filed. No such pleading has been filed by the Reserve Bank in this case. The counter-motion is premature.

Moore's Federal Practice, Vol. 3, p. 3181

U. S. v. Adler's Creamery Inc., C.C.A., 2d, 1939 107 Fed. (2d) 987

Fox v. Johnson and Wimsatt, 127 Fed. (2d)

The motion of the Board of Governors of the Fed-

eral Reserve System for dismissal will be granted. This Board is an independent [169] establishment of the United States, created by the Congress to perform certain important governmental functions prescribed by the Federal Reserve Act and other statutes (30 Op. Atty. Gen. 308, 311). Neither in the enactment creating the Board nor in any subsequent act has the Congress given its consent to suits against the Board. Aside from this, however, it is undeniably true that, by law, the habitat or official residence of this Board is in the District of Columbia (U.S.C., Tit. 12, Sec. 244). Service of summons and complaint in this case was made by sending a copy thereof by registered mail to the Board at its office in Washington, D. C. The appearance entered by the Board was special, for the sole purpose of testing the jurisdiction of this Court over it. Whether or not this suit be considered as one against the United States and therefore not maintainable against the government without its own consent or Congressional sanction, it is undeniably true that the Board is not an "inhabitant" of this district and therefore may not be sued herein without its consent (U.S.C., Tit. 28, Sec. 112). That this is the law is amply supported by the authorities.

International Molders Union v. National Labor Relations Board, 26 Fed. Supp. 423

Appalachian Electric Power Co. v. Smith (C.C.A. 4th) 67 Fed. (2d) 451; certiorari denied, 291 U.S. 674

Raichle v. Federal Reserve Bank of New York (C.C.A. 2d) 34 Fed. (2d) 910

Howard v. United States ex rel. Alexander (C.C.A., 10th) 126 Fed. (2d) 667; certiorari denied, 62 S. Ct. 1297, 316 U.S. 699, 86 L. Ed. 1768

Kentucky Natural Gas Corporation v. Public Service Commission of Kentucky (D.C., Ky.) 28 Fed. Supp. 509; affirmed in C.C.A., 119 Fed. (2d) 417

Carr v. Desjardines (D.C., Okla.) 16 Fed. Supp. 346

United States v. Western Fruit Growers, Inc. (D.C., Cal.) 34 Fed. Supp. 794

Plaintiff contends that, because the Federal Reserve Act makes provision for the appointment in each Reserve district of a Federal Reserve agent who, in addition to his duties as chairman of the board of directors of the Reserve bank, is required to maintain a local office of the Board on the premises of the Reserve Bank and to act as the official representative of the Board in the performance of the functions of the Board (U.S.C., Tit. 12, Sec. 305), [170] the situation is *sui generis* and the general rule is inapplicable. With this contention, I do not agree. If it were sound, it would subject the Board to the jurisdiction of any district court in any district where a Reserve bank is maintained and a Federal Reserve agent could be found. In many of the cases in which the right of governmental agencies to be sued only in the District of Columbia has been sustained, there have been local agents with powers as broad as those accorded Fed-

eral Reserve agents, authorized to act and acting for the agency at the place where the suit was brought, but the fact that such agency existed has not been held to create an exception to the rule. Nor has the plaintiff cited any cases in support of its contention.

The motion of Henry F. Grady, Federal Reserve Agent, for dismissal as to him is likewise granted. It is not contended that Grady performed any function or had any authority to act in connection with the imposition of the condition of membership concerning which complaint is made. He is described in plaintiff's brief as "a proper though not indispensable party" (Plaintiff's Brief, p. 86). It may be true that, if he had been an actor in the matters concerning which complaint is made and if he had legal authority for such acts, he would be a proper party. But the question presented on this motion to dismiss are primarily whether the Board is an indispensable party and, if so, whether, with the Board absent, this Court can proceed with the suit as against the Reserve Agent. In other words, granting that this Court has jurisdiction of the person of the Reserve Agent, does the complaint state a claim for relief as to him and is there any justiciable controversy as to him in the absence of the Board. In matters of the kind involved in this suit, the Board is undoubtedly an indispensable party and, under the facts alleged in the complaint, there exists no cause of action against the Reserve Agent and no justiciable controversy between him and plaintiff. Plaintiff says:

“No allegation is made that the Reserve Agent took any part in the imposition upon the plaintiff of the invalid condition, but it is alleged that he, along with the other defendants, contends that it is a valid condition and intends to enforce it as against the plaintiff.”

(Plaintiff's Brief on motion to dismiss complaint, p. 7). [171]

Regardless of what the Reserve Agent believes regarding the validity of the condition of membership (a matter which is entirely immaterial), a careful search of the law governing his statutory authority fails to disclose any provision which would confer upon him any authority to enforce the conditions or penalize plaintiff for breach thereof (U.S.C., Tit. 12, Secs. 305, 411 to 417, inc., and 445). Moreover, the mere expression by the pleader of the opinion or fear that the Reserve Agent “intends” to enforce the condition, without any allegation as to when, where or by what means the threat of enforcement was made, does not assist in stating a valid claim (National War Labor Board, et al. v. Montgomery Ward & Co., Inc., 144 Fed. (2d) 528). The power and responsibility of fixing conditions of membership for state banks applying for admission to the Federal Reserve System, as well as the administrative power to expel banks from the Federal Reserve System for violation, are vested by law in the Board of Governors of the Federal Reserve System and in that body alone. In such matters, the Federal Reserve Agent has no authority whatever

and, if an injunction were to be granted in this suit, it would be the hands of the Board which must be tied, not those of the Federal Reserve Agent. In the absence of the Board, there exists no justiciable controversy between plaintiff and the Federal Reserve Agent and no jurisdiction in this Court to hear the case as to him.

Appalachian Electric Power Co. v. Smith,
supra

New Orleans Private Patrol, etc. v. Fleming
(D.C., La.) 33 Fed. Supp. 856

Webster v. Fall, Secretary of Interior 45 S.
Ct. 148, 266 U.S. 507

Redlands Foothill Groves v. Jacobs (D.C.,
Cal.) 30 Fed. Supp. 995

Bethlehem Ship Building Corp. v. Nylander,
et al. (D.C., Cal.) 14 Fed. Supp. 201

James, Inspector v. Lake Wales Citrus Grow-
ers Assn. (C.C.A., 5th) 110 Fed (2d) 653

In opposition to the motion to dismiss and the alternative notion for summary judgment interposed by the Federal Reserve Bank of San Francisco, plaintiff very earnestly and ably argues that, even though this Court does not have jurisdiction to hear the suit as against the Board and even though it be found, as I have found, that, as to the Federal Reserve Agent, the complaint fails to [172] state a claim or cause of action upon which relief can be granted, nevertheless this Court has jurisdiction of the person of the Federal Reserve Bank and should proceed with the suit as against it. In opposition to

the motion to dismiss, it is argued that the complaint states a cause of action as against the Reserve Bank alone (Plaintiff's Brief, pp. 5, 6); that the complaint shows the existence of a cloud upon or an adverse claim affecting plaintiff's ownership of stock in the Reserve Bank (Plaintiff's Brief, pp. 87-93); and that the condition of membership is absolutely void and therefore the fact of its acceptance by plaintiff is immaterial (Plaintiff's Brief, pp. 14-55). These and the other arguments made in opposition to the Reserve Bank's motion to dismiss I have considered carefully.

In opposition to the alternative motion for summary judgment interposed by the Reserve Bank, it is argued that it is immaterial that the Reserve Bank acted in a purely ministerial and clerical capacity on behalf of the defendant Board; that the complaint alleges and the fact is that the Reserve Bank "imposed" the condition complained of as a requirement of its own and that it is neither legally nor factually true that the Reserve Bank is without authority to take proceedings for the enforcement of condition No. 4.

First, in connection with the motion for summary judgment, I have read the two affidavits of William A. Day, President of the Reserve Bank, and the counter-affidavit of W. M. Parker, Cashier of plaintiff bank, and have considered the cases cited in the briefs. It seems clear from the uncontradicted statements contained in the Day affidavits that the Reserve Bank has never taken any position with regard to the validity of the condition; that it has not at-

tempted to and does not intend in the future to attempt to enforce the condition; and that, prior to this suit, it had never received from plaintiff any complaint regarding the condition or its imposition. It is equally clear that neither the letter dated May 7, 1942, addressed by the Reserve Bank to plaintiff (Day Affidavit, Ex. I), transmitting the "suggested form" of resolution for adoption by plaintiff's board, nor the resolution itself constituted an attempt [173] by the Reserve Bank to take action independent of that of the Board with relation to the condition of membership. These were pursuant to instructions from the Board and constitute the mere action of the Board. It is also clear from the law that Congress has vested in the Board, and in that body only, the power and authority to prescribe conditions of membership for state member banks and, after administrative hearing, to forfeit membership upon proper proof of violation of the law or the regulations of the Board made pursuant thereto (U.S.C., Tit. 12, Sec. 327). Neither the Parker affidavit nor the exhibits thereto tend to contradict these conclusions. Therefore, there is ample reason to grant the motion of the Reserve Bank for summary judgment. However, due to the fact that I have concluded that I do not have jurisdiction of the subject matter of the suit as it affects the Reserve Bank and have decided to grant its motion to dismiss, the motion for summary judgment will be denied.

I am of the opinion that, as against the Federal

Reserve Bank of San Francisco, the complaint fails to state a claim or cause of action upon which relief can be granted; that as to that bank alone this suit is one against a subaltern without authority and is not maintainable; and that this suit does not present a proper case for injunctive relief, because in the complaint no coercion or compulsion in the legal sense is alleged, because it does not appear from the complaint that plaintiff is now confronted with any immediate or imminent danger of injury, irreparable or otherwise, and because, as between plaintiff and the Reserve Bank, no justifiable controversy, in the legal sense, exists. It is my opinion, also, that this suit may not properly be maintained as one to remove a cloud upon the title of plaintiff's stock in the Reserve Bank. For the foregoing reasons, the motion of the Federal Reserve Bank of San Francisco for dismissal as to it will be granted.

All state banks desiring to become members of the Federal Reserve System are required to apply to the Board of Governors, under such rules and regulations as it may prescribe, for the right to subscribe for stock in the appropriate Reserve bank. The Board, [174] subject to the provisions of the Act and subject to such conditions as it may prescribe pursuant thereto, may permit the applying bank to become a member (U.S.C., Tit. 12, Sec. 321). If at any time it should appear to the Board that a member bank has failed to comply with the applicable provisions of the Act or the regulations of the Board, it is within the sole power of the Board, after hearing, to require the offending bank

to surrender its stock and forfeit membership. The Board may, in proper cases, restore forfeited membership (U.S.C., Title 12, Sec. 327). Whenever a member bank is ordered by the Board, under authority of law, to surrender its stock holdings in the Reserve Bank, all its rights and privileges as a member bank thereupon cease (U.S.C., Tit. 12, Sec. 328). It is thus evident from the law that the Board is the only body vested by Congress with authority to admit and expel state member banks. That that is true is equally evident from Regulation H, promulgated by the Board and governing the membership of state banks (C. F. Reg., U.S.C., Tit. 12, Ch. II, Part 208). This being true, any act on the part of the Reserve Bank, looking to the imposition of conditions of membership or the enforcement thereof, would be an act on its part, without authority in law and without binding effect. The complaint alleges that plaintiff's application for membership was approved by the Board, which gave its permission to plaintiff to become a member bank subject to conditions (Complaint, Par. IV). The subsequent allegation to the effect that the Reserve Bank "required" the acceptance of the condition and an agreement to comply with it, while no doubt made for the purpose of giving this Court a semblance of jurisdiction, does not aid to that end for, at best, it must be concluded that, if true, the Reserve Bank was merely passing on to plaintiff the conclusions reached by the Board, the only body vested with authority in the premises. As a subaltern without authority, the Reserve Bank may

not be sued alone for the alleged misfeasance of the admitted superior. The relief sought is from the Reserve Board, not the Reserve Bank. To allow this suit to be maintained as against the subordinate alone would be contrary to the settled rules of equity practice. [175]

Warner Valley Stock Co. v. Smith 165 U.S. 28, 34, 17 S. Ct. 225, 41 L. Ed. 621

Gnerich v. Rutter, 265 U.S. 388 44 S. Ct. 532, 68 L. Ed. 1068

Jewel Productions, Inc. v. Morgenthau 100 Fed. (2d) 390

Neher v. Harwood, (C.C.A., 9th) 128 Fed. (2d) 846, 849

Defendant Reserve Bank also urges that the complaint does not allege a proper case of coercion or compulsion warranting equitable relief; that there is presented no proper case for declaratory relief; that plaintiff has sustained no present injury; and that, taken at its best, the complaint sets forth a case of anticipated possible future injury which may or may not be sustained, depending upon future and, as yet, unannounced action by the Board of Governors of the Federal Reserve System. It is claimed that this case is governed by decision such as the following:

Smith v. American Asiatic Underwriters (C.C.A., 9th) 127 Fed. (2d) 754

Southern Pacific Company v. Conway (C.-C.A., 9th) 115 Fed. (2d) 746

United States v. West Virginia 295 U.S. 463,
55 S. Ct. 789, 79 L. Ed. 1546

Northport Power & Light Co. v. Hartley 283
U.S. 568, 51 S. Ct. 581, 75 L. Ed. 1275

These arguments seem sound and, aside from the more important questions of jurisdiction over the subject matter, sufficient to warrant sustaining the motion to dismiss. The condition of membership complained of is certainly not self-executing. It provides merely that, if Transamerica Corporation or its subsidiaries acquire stock of plaintiff bank without the Board's permission and if the Board, being advised of that fact, gives plaintiff notice, plaintiff will withdraw from or surrender its membership in the Federal Reserve System. It is to be presumed that, the two prerequisite facts existing, if the plaintiff refused to surrender its membership in the System on notice from the Board, this would constitute a violation of the condition. But it is not alleged that the Board has taken any action of the kind described and, since over six months elapsed between the filing of the complaint in this suit and the hearing on the motions without a supplemental complaint being filed, it may be presumed that the Board has not yet acted. However that may be, it is clear that the complaint [176] presents a case of anticipated, possible injury, based, it seems largely, upon conjecture and not such a case of immediate and impending danger as would warrant injunctive relief.

National War Labor Board v. Montgomery
Ward, *supra*

Finally, it is my opinion that there is no merit in plaintiff's contention that condition No. 4 constitutes a cloud upon the title to plaintiff's stock in the Reserve Bank or an adverse claim affecting the same, in the nature of a cloud, the existence of which the Court has power to remove. Plaintiff's shares in the Reserve Bank are a mere incident to its membership therein. This stock is non-transferable, non-negotiable and has no "market value". Title to this stock must, under the law, remain in plaintiff bank so long as it is a member bank and, when and if that status is forfeited, the title to the stock is likewise forfeited. None of the defendants claims estate or interest in the stock adverse to plaintiff. Clearly a case is not presented which is governed by section 738 of the California Code of Civil Procedure. The suit sounds in personam against the Board of Governors for alleged abuse of discretion, not in rem. Moreover, if, as I have determined, this Court is without jurisdiction to hear the case, as against the Board, jurisdiction as to all other incidents of the case likewise fails.

Hartmann v. Federal Reserve Bank of Philadelphia, 55 Fed. Supp. 801.

1. The motion of the plaintiff, Peoples Bank, for summary judgment against the defendant, Federal Reserve Bank of San Francisco, is denied.

2. The motion of the defendant, Federal Reserve Bank of San Francisco, for summary judgment against the plaintiff is denied.

3. The motion of the defendant, Federal Reserve

Bank of San Francisco, to strike plaintiff's motion for summary judgment is granted.

4. The motions to dismiss filed by each of the defendants will be granted.

The Court is of the view that the defendant Board of [177] Governors of the Federal Reserve System is an indispensable party not properly before the Court and that the complaint does not state a claim for equitable relief as for declaratory judgment within the jurisdiction of this Court as to any of the defendants. Therefore, this Complaint is dismissed as to all defendants for lack of jurisdiction of this Court.

An order will be entered in accordance with this Opinion.

Dated: San Francisco, California, November 17th, 1944.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Nov. 17, 1944. [178]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the Peoples Bank, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit that part of the Order of the above entitled Court, Honorable Michael J. Roche, Judge presiding, dated the 17th day of November, 1944, and en-

tered in thte above entitled cause, which (a) grants the motion of defendant Federal Reserve Bank of San Francisco to dismiss, and (b) grants the motion of the defendant Henry F. Grady to dismiss, and (c) dismisses said action as against the said defendant.

Dated: This 16th day of December, 1944.

SANNER, FLEMING & IRWIN

By JOHN AMOS FLEMING

WILLKIE, OWEN, OTIS,

FARR & GALLAGHER

By CARL M. OWEN

[Endorsed]: Filed Jan. 15, 1944. [179]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

The plaintiff above named, having appealed herein from that part of thte Order of the above entitled Court, entered on or about November 17, 1944, granting the motions of the defendants Federal Reserve Bank of San Francisco and Henry F. Grady to dismiss, now states the following points on which appellant intends to rely upon said appeal, viz:

1. That the above entitled court erred in granting the motion of defendant Federal Reserve Bank of San Francisco, to dismiss, for that:

(a) The said Court had jurisdiction of the subject-matter of the action;

(b) The said Court had jurisdiction of the person [180] of the said defendant Federal Reserve Bank of San Francisco;

(c) The plaintiff's complaint states facts sufficient to warrant the relief prayed for therein as against the defendant Federal Reserve Bank of San Francisco.

2. That the above entitled Court erred in granting the motion of defendant Henry F. Grady to dismiss, for that:

(a) The said Court had jurisdiction of the subject-matter of the action;

(b) The said Court had jurisdiction of the person of the defendant Henry F. Grady;

(c) The plaintiff's complaint stated facts sufficient to warrant the relief prayed for as against the defendant Henry F. Grady.

SANNER, FLEMING & IRWIN

By JOHN AMOS FLEMING

WILLKIE, OWEN, OTIS,

FARR & GALLAGHER

By CARL M. OWEN

Attorneys for Appellant

[Endorsed]: Filed Jan. 18, 1945. [181]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

To the Clerk of the above entitled Court:

The appellant designates the following portions of the record to be contained in the Record on Appeal in the above entitled action:

1. The complaint.
2. The Motion of defendant Federal Reserve Bank of San Francisco to Dismiss.
3. The Motion of the defendant Henry F. Grady to dismiss, with his affidavit in support thereof.
4. The Opinion.
5. The Order entered on or about November 17, 1944 granting the motions of the defendant Federal Reserve Bank of San Francisco and Henry F. Grady to dismiss.
6. The Notice of Appeal.
7. This designation.
8. Designation of appellees of additional matters to be [182] included in the record.
9. Statement of points upon which appellant intends to rely on appeal.

Dated this 15th day of January, 1945.

SANNER, FLEMING & IRWIN

By JOHN AMOS FLEMING

WILLKIE, OWEN, OTIS,

FARR & GALLAGHER

By CARL M. OWEN

Attorneys for Appellant

[Endorsed]: Filed Jan. 18, 1945. [183]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including March 5, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: January 24, 1945.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Jan. 24, 1945. [184]

[Title of District Court and Cause.]

**DESIGNATION OF APPELLEE HENRY F.
GRADY, FEDERAL RESERVE AGENT,
OF ADDITIONAL PORTIONS OF REC-
ORD TO BE INCLUDED IN RECORD ON
APPEAL**

To the Clerk of the above entitled Court; to the Plaintiff and Appellant, Peoples Bank, and to its attorneys, Messrs. Sanner, Fleming & Irwin and Messrs. Willkie, Owen, Otis, Farr & Gallagher:

Appellee, Henry F. Grady, Federal Reserve Agent, one of the defendants in the above entitled action, hereby designates the following portions of the record to be included in the Record on Appeal in said action in addition to the portions of the

record specified in "Appellant's Designation of Portions of the Record to be Contained in the Record on Appeal," dated [185] January 15, 1945, and filed herein by Plaintiff and Appellant on or about January 18, 1945:

(1) Affidavit of William A. Day in Support of Motion of Defendant Federal Reserve Bank of San Francisco for Summary Judgment, dated May 29, 1944, filed in said action, and received in evidence on October 10, 1944.

(2) Affidavit of W. M. Parker in Opposition to Motion for Summary Judgment of Defendant Federal Reserve Bank of San Francisco, subscribed and sworn to on or about July 19, 1944, filed in said action, and received in evidence on October 10, 1944.

(3) Supplemental Affidavit of William A. Day in Support of Motion of Defendant Federal Reserve Bank of San Francisco for Summary Judgment, dated October 4, 1944, filed in said action, and received in evidence on October 10, 1944.

(4) This designation.

Dated: January 26, 1945.

FRANK J. HENNESSY

United States Attorney

W. E. LICKING

Assistant United States At-
torney

J. P. DREIBELBIS

GEORGE B. VEST

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER

By WM. L. LEACHMAN
Of Counsel

Attorneys for Defendant and Appellee Henry F.
Grady, Federal Reserve Agent

[Endorsed]: Filed Jan. 26, 1945. [186]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the Federal Reserve Bank of San Francisco, one of the defendants above named, hereby appeals and cross-appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that part of the Order of the above entitled Court, Honorable Michael J. Roche, Judge presiding, dated the 17th day of November, 1944, and entered in the above entitled cause, which denies the Motion of Defendant Federal Reserve Bank of San Francisco for Summary Judgment.

Dated: February 3, 1945.

ALBERT C. AGNEW

JOHN A. O'KANE

Attorneys for Federal Reserve Bank of San Francisco, Appellee and Cross-Appellant.

[Endorsed]: Filed Feb. 3, 1945. [187]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT FEDERAL RESERVE BANK OF SAN FRANCISCO INTENDS TO RELY ON ITS CROSS-APPEAL

The defendant Federal Reserve Bank of San Francisco, having appealed herein from that part of the Order of the above-entitled Court, entered on or about November 17, 1944, which denies the motion of said defendant for summary judgment, now states the following points on which appellant intends to rely upon said appeal and cross-appeal, namely:

(a) The alternative Motion of Defendant Federal Reserve Bank of San Francisco for Summary Judgment should have been granted by the District Court, if it be held, for any reason, that the District Court erred in granting this defendant's motion to dismiss.

(b) The pleadings and admissions on file, together with the affidavits show that, as between plaintiff and defendant Federal Reserve Bank of

San Francisco, there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law, pursuant to Rule 56 of Federal Rules of Civil Procedure, and the denial thereof constituted error of the District Court.

Dated: February 5, 1945.

ALBERT C. AGNEW

JOHN A. O'KANE

Attorneys for Federal Reserve Bank of San Francisco, Appellee and Cross-Appellant.

[Endorsed]: Filed Feb. 5, 1945. [189]

[Title of District Court and Cause.]

DESIGNATION OF APPELLANT, FEDERAL
RESERVE BANK OF SAN FRANCISCO,
OF PORTION OF RECORD, PROCEED-
INGS AND EVIDENCE TO BE CON-
TAINED IN RECORD ON APPEAL, ON
ITS CROSS-APPEAL

To the Clerk of the above-entitled Court:

Please prepare and certify Record on Appeal, in the above-entitled action, on the appeal and cross-appeal of defendant Federal Reserve Bank of San Francisco, consisting of the following:

1. Complaint.
2. Motion of Defendant Federal Reserve Bank of San Francisco for Summary Judgment, including Notice of Motion and Memorandum of Points and Authorities in Support thereof.

3. Affidavit of William A. Day in Support of [190] Motion of Defendant Federal Reserve Bank of San Francisco for Summary Judgment.

4. Plaintiff's Motion for Summary Judgment Against the Defendant Federal Reserve Bank of San Francisco.

5. Affidavit of W. M. Parker in opposition to motion for summary judgment of defendant Federal Reserve Bank of San Francisco and in support of plaintiff's Motion for Summary Judgment.

6. Supplemental Affidavit of William A. Day in Support of Motion of Defendant Federal Reserve Bank of San Francisco for Summary Judgment.

7. Affidavit of Henry F. Grady, Federal Reserve Agent, in Support of His Motion to Dismiss.

8. The Opinion.

9. The Order entered on or about November 17, 1944, denying the Motion of the Defendant Federal Reserve Bank of San Francisco for Summary Judgment.

10. The Notice of Appeal, dated February 3, 1945, filed herein the same date.

11. This designation.

12. Designation of cross-appellee, Peoples Bank, of additional matters to be included in the record.

13. Statement of Points on which appellant intends to rely on its cross-appeal.

14. Those certain parts of the Reporter's Transcript of Proceedings at the hearings had October 9 and 10, 1944, stenographically reported by the official reporter of the above-entitled Court (copy of which is filed herewith, in addi- [191] tion to

certified copy delivered by the reporter to the clerk pursuant to 28 U.S.C.A. 9a), as follows:

Page 5, line 16 to and including line 25.

Page 70, line 1 to and including page 72, line 6.

Page 75, line 1 to and including line 22.

Page 114, line 3 to and including line 18.

Page 118, line 18 to and including page 119, line 2

Page 121, line 22 to page 122, line 8.

Page 124, line 11 to line 17.

Page 134, line 22 to and including page 136, line 7.

Page 140, line 1 to line 20.

Page 162, line 25 to and including page 165, line 7.

Page 166, line 18 to and including page 167, line 7.

Page 170, line 18 to and including page 172, line 19.

Page 187, line 4 to and including page 189, line 20.

Page 191, line 4 to and including page 206, line 25.

Dated: February 5, 1945.

ALBERT C. AGNEW

JOHN A. O'KANE

Attorneys for Federal Reserve Bank of San Francisco, Appellee and Cross-Appellant.

[Endorsed]: Filed Feb. 5, 1945. [192]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF APPELLEE
FEDERAL RESERVE BANK OF SAN
FRANCISCO, OF ADDITIONAL POR-
TIONS OF RECORD TO BE INCLUDED
IN RECORD ON APPEAL

To the Clerk of the above-entitled Court; to the Plaintiff and Appellant, Peoples Bank, and to its attorneys, Messrs. Sanner, Fleming & Irwin and Messrs. Willkie, Owen, Otis, Farr & Gallagher:

Appellee, Federal Reserve Bank of San Francisco, one of the defendants in the above-entitled action, now files its amended designation, hereby designating the following portions of the record to be included in the Record on Appeal in said action, in addition to the portions of the record specified in "Appellant's Designation of Portions of the Record to be Contained in the Record on Appeal," dated January 15, 1945, and filed herein by plaintiff and appellant on or about January 18, [193] 1945, as follows:

1. Those certain parts of the Reporter's Transcript of Proceedings at the hearings had October 9 and 10, 1944, stenographically reported by the official reporter of the above-entitled Court, as follows:

Page 5, line 16 to and including line 25.

Page 70, line 1 to and including page 72, line 6.

Page 75, line 1 to and including line 22.

Page 114, line 3 to and including line 18.

Page 118, line 18 to and including page 119, line 2.

Page 121, line 22 to page 122 line 8.

Page 124, line 11 to line 17.

Page 134, line 22 to and including page 136, line 7.

Page 140, line 1 to line 20.

Page 162, line 25 to and including page 165, line 7.

Page 166, line 18 to and including page 167, line 7.

Page 170, line 18 to and including page 172, line 19.

Page 187, line 4 to and including page 189, line 20.

Page 191, line 4 to and including page 206, line 25.

2. This amended designation.

Dated: February 6, 1945.

ALBERT C. AGNEW

JOHN A. O'KANE

Attorneys for Federal Reserve Bank of San Francisco, Defendant and Appellee.

[Endorsed]: Filed Feb. 6, 1945. [194]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF APPELLANT
PEOPLES BANK, DESIGNATING ADDI-
TIONAL PORTIONS OF THE RECORD TO
BE INCLUDED IN RECORD ON APPEAL

To the Clerk of the above entitled Court; to the defendant and appellee Federal Reserve Bank of San Francisco, and to its attorneys Albert C. Agnew and John A. O'Kane, and to the defendant and appellee Henry F. Grady, Federal Reserve Agent, and to his attorneys, Frank

J. Hennessy, W. E. Licking, J. P. Dreibelbis,
George B. Vest and Messrs. Robertson, Leach-
man, Payne, Gardere & Lancaster:

The Appellees having designated to be incorporated in the Record on Appeal herein certain portions of the stenographic transcript of the hearing before the District Court, now as complementary thereto and necessary to the proper understanding thereof Appellant Peoples Bank files its Amended Designation on Appeal, hereby designating the following portions of the record to be included in the Record on Appeal in said action, in addition to the portions specified and designated in its "Appellant's Designation of Portions of the Record to be Contained in the Record on Appeal," dated January 15, 1945, and filed January 18, 1945, as follows:

1. Those certain parts of the Reporter's Transcript of Proceedings at the hearing had October 9th and 10th, 1944, stenographically reported by the official reporter of the above entitled Court, as follows:

Page 21, line 18 to page 22, line 12, inclusive;

Page 72, line 7 to 17, inclusive;

Page 114, line 18, to page 115, line 21, inclusive;

Page 126, line 8, to page 129, line 6, inclusive;

[195]

Page 130, line 17, to page 132, line 7, inclusive;

Page 150, lines 24 to page 151, lines 1 and 2, being the sentence at the bottom of page 150 and top of page 151;

Page 202, last two lines to the end of page 204.

2. This amended designation.

Dated: February 15, 1945.

SANNER, FLEMING & IRWIN

By JOHN AMOS FLEMING

WILLKIE, OWEN, OTIS,

FARR & GALLAGHER

By CARL M. OWEN

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Feb. 19, 1945. [196]

[Title of District Court and Cause.]

DESIGNATION OF CROSS-APPELLEE PEOPLES BANK OF ADDITIONAL PORTIONS OF RECORD TO BE INCLUDED IN RECORD ON CROSS-APPEAL

To the Clerk of the above entitled Court; to the defendant and cross-appellant Federal Reserve Bank of San Francisco, and to its attorneys Albert C. Agnew and John A. O'Kane:

Cross-Appellee, Peoples Bank, plaintiff in the above entitled action, hereby designates the following portions of the record to be included in Record on Cross-Appeal in said action in addition to the portions of the record specified in "Designation of Appellant, Federal Reserve Bank of San Francisco, of Portion of Record, Proceedings and

Evidence to be Contained in Record on Appeal, on its Cross-Appeal," dated February 5, 1945 and filed herein by said defendant and cross-appellant on February 5, 1945, as follows:

1. Those certain parts of the Reporter's Transcript of Proceedings at the hearings had October 9th and 10th, 1944, stenographically reported by the official reporter of the above entitled Court (certified copy of which was delivered by said reporter to the Clerk of this Court pursuant to 28 U.S.C.A. 9(a)) as follows:

Page 21, line 18 to page 22, line 12, inclusive;

Page 72, line 7 to 17, inclusive;

Page 114, line 18, to page 115, line 21, inclusive;

Page 126, line 8, to page 129, line 6, inclusive;

Page 130, line 17, to page 132, line 7, inclusive;

Page 150, lines 24 to page 151, lines 1 and 2, being the sentence at the bottom of page 150 and top of page 151; [197]

Page 202, last two lines to the end of page 204.

2. This designation.

Dated: February 15, 1945.

SANNER, FLEMING & IRWIN

By JOHN AMOS FLEMING

WILLKIE, OWEN, OTIS,

FARR & GALLAGHER

By CARL M. OWEN

Attorneys for Cross-Appellee

[Endorsed]: Filed Feb. 19, 1945. [198]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including March 16, 1945 to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: March 5, 1945.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Mar. 5, 1945. [199]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 199 pages, numbered from 1 to 199, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Peoples Bank, Plaintiff, vs. Federal Reserve Bank of San Francisco, Board of Governors of the Federal Reserve System, and Henry F. Grady, Federal Reserve Agent, Defendants, No. 23243 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and

certifying the foregoing transcript of record on appeal is the sum of \$24.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of March, A. D. 1945.

[Seal]

C. W. CALBREATH,
Clerk

By E. VAN BUREN
Deputy Clerk [200]

[Endorsed]: No. 11002. United States Circuit Court of Appeals for the Ninth Circuit. Peoples Bank, Appellant, vs. Federal Reserve Bank of San Francisco, and Henry F. Grady, Federal Reserve Agent, Appellees, and Federal Reserve Bank of San Francisco, Appellant, vs. Peoples Bank, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 14, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11002

FEDERAL RESERVE BANK OF SAN
FRANCISCO,

Defendant and Appellant,

v.

PEOPLES BANK,

Plaintiff and Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT FEDERAL RESERVE BANK
OF SAN FRANCISCO INTENDS TO RELY
ON ITS CROSS APPEAL

The defendant Federal Reserve Bank of San Francisco, having appealed herein from that part of the Order of the District Court of the United States for the Northern District of California, Southern Division, entered on or about November 17, 1944, which denies the motion of said defendant for summary judgment, now states the following points on which appellant intends to rely upon said appeal and cross appeal, namely:

(a) The alternative motion of defendant Federal Reserve Bank of San Francisco for summary judgment should have been granted by the said District Court, if it be held, for any reason, that the said District Court erred in granting this defendant's motion to dismiss.

(b) The pleadings and admissions on file, together with the affidavits, show that, as between plaintiff and defendant Federal Reserve Bank of San Francisco, there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law, pursuant to Rule 56 of Federal Rules of Civil Procedure, and the denial thereof constituted error of the said District Court.

Dated: March 16, 1945.

ALBERT C. AGNEW

JOHN A. O'KANE

Attorneys for Federal Reserve Bank of San Francisco, Appellant.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF APPELLANT FEDERAL
RESERVE BANK OF SAN FRANCISCO
OF NECESSARY PORTIONS OF THE
RECORD, AND PORTIONS OF THE REC-
ORD TO BE PRINTED, ON ITS CROSS
APPEAL

Appellant Federal Reserve Bank of San Francisco, hereby designates the entire record in the above entitled matter, heretofore certified to this Court by the United States District Court for the Northern District of California, Southern Division, as necessary to the consideration of the points on which it intends to rely on appeal, and hereby designates the entire said record to be printed, and

further hereby designates Statement of Points on Which Appellant Federal Reserve Bank of San Francisco Intends to Rely on Its Cross Appeal, filed herewith, and this Designation, to be printed.

Dated: March 16, 1945.

ALBERT C. AGNEW

JOHN A. O'KANE

Attorneys for Federal Reserve Bank of San Francisco, Appellant.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

The appellant above named, having appealed herein from that part of the Order of the District Court of the United States, Northern District of California, Southern Division, entered on or about November 17, 1944, granting the motions of the defendants Federal Reserve Bank of San Francisco and Henry F. Grady to dismiss, now states the following points on which appellant intends to rely upon said appeal, viz:

1. That the said District Court of the United States erred in granting the motion of defendant Federal Reserve Bank of San Francisco, to dismiss, because:

(a) The said court had jurisdiction of the subject matter of the action;

(b) The said court had jurisdiction of the person of the said defendant Federal Reserve Bank of San Francisco;

(c) The Board of Governors of the Federal Reserve System is not an indispensable party to this action;

(d) Suit against the individual members of the Board of Governors of the Federal Reserve System is not a prerequisite to relief against the defendant bank.

(e) A justiciable controversy exists between the plaintiff and the defendant Federal Reserve Bank of San Francisco;

(f) This suit is timely and the declaratory relief prayed for is immediately appropriate and necessary;

(g) The plaintiff's' complaint states facts sufficient to warrant the relief prayed for therein as against the defendant Federal Reserve Bank of San Francisco.

2. That the said District Court of the United States erred in granting the motion of defendant Henry F. Grady to dismiss, because:

(a) The said court had jurisdiction of the subject matter of the action;

(b) The said court had jurisdiction of the person of the defendant Henry F. Grady;

(c) The Board of Governors of the Federal Reserve System is not an indispensable party;

(d) A justicable controversy exists between the plaintiff and the defendant Henry F. Grady;

(e) The plaintiff's complaint stated facts suf-

ficient to warrant the relief prayed for as against the defendant Henry F. Grady.

Dated: Mar. 14, 1945.

SANNER, FLEMING & IRWIN
By JOHN AMOS FLEMING
WILLKIE, OWEN, OTIS,
FARR & GALLAGHER,
By CARL M. OWEN
KENNETH M. JOHNSON
Attorneys for Appellant.

[Endorsed]: Filed March 14, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF NECES-
SARY PORTIONS OF THE RECORD AND
PORTIONS OF THE RECORD TO BE
PRINTED

Appellant Peoples Bank hereby designates the entire record in the above entitled matter, heretofore certified to this Court by the United States District Court for the Northern District of California, Southern Division, as necessary to the consideration of the points on which it intends to rely on appeal, and designates the entire said record to be printed, and further designates Statement of Points Upon Which Appellant Intends to Rely on Appeal, filed herewith, and this Designation, to be printed.

Dated: Mar. 14, 1945.

SANNER, FLEMING & IRWIN

By JOHN AMOS FLEMING

WILLKIE, OWEN, OTIS,

FARR & GALLAGHER

By CARL M. OWEN

KENNETH M. JOHNSON

Attorneys for Appellant.

[Endorsed]: Filed March 14, 1945. Paul P.
O'Brien, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PEOPLES BANK,

Plaintiff,

against

FEDERAL RESERVE BANK OF SAN FRANCISCO,
BOARD OF GOVERNORS OF THE FEDERAL RE-
SERVE SYSTEM and HENRY F. GRADY, Federal
Reserve Agent,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT.

SANNER, FLEMING & IRWIN,
WILLKIE, OWEN, OTIS, FARR & GALLAGHER,
KENNETH M. JOHNSON,
Attorneys for Plaintiff-Appellant.

CARL M. OWEN,
JOHN AMOS FLEMING,
KENNETH M. JOHNSON,
Of Counsel.

FILED

MAY 22 1945

PAUL P. O'BRIEN,
CLERK

SUBJECT INDEX.

	PAGE
STATEMENT	2
SPECIFICATIONS OF ERRORS OF DISTRICT COURT.....	5
WHAT CONSTITUTES THE FEDERAL RESERVE SYSTEM.....	6
A. The Board of Governors of the Federal Reserve System	6
B. The Federal Reserve Banks.....	6
C. Member Banks	7
D. Federal Reserve Agent.....	8
SUMMARY OF ARGUMENT.....	8
SOME PRELIMINARY OBSERVATIONS.....	10
PROPOSITIONS OF LAW IN SUPPORT OF THE APPEAL:	
I. Condition No. 4 is invalid because there is no warrant or authority in law for the imposition of any condition remotely resembling that condition	14
II. Not only is the condition invalid for complete lack of authority to impose any condition of that character and for that purpose, but it is also invalid because arbitrary, unreasonable and unjust, and because it is discriminatory	34
III. If the statute be construed as authorizing the Board to prescribe condition No. 4, the statute would be unconstitutional as involving a delegation of the legislative power vested in Congress alone under Section 1 of Article I of the Constitution, also in con-	

travention of the delegation of legislative power to Congress in specific instances enumerated in Section 8 of Article I. Such exercise of power by the defendants is likewise unconstitutional as being in violation of the Fifth Amendment to the Constitution	37
IV. The Board of Governors is not an indispensable party	39
V. There is a "justiciable controversy" within the meaning of the Declaratory Judgment Statute (Section 400 of Title 28) between the plaintiff and the Reserve Bank. The Defendant Reserve Bank has many important steps to take in any attempted effective enforcement of condition No. 4 and it intends to take those steps.....	46
VI. The suit, as a suit for declaratory judgment, is timely	55
VII. The claim of the Board of Governors and of the defendant Reserve Bank of a right to deprive the plaintiff of its stock in the defendant Reserve Bank by an enforcement of condition No. 4 is an adverse claim within the purview of Section 738 of the Code of Civil Procedure of California, the existence of which adverse claim the Federal Court in this case can ascertain and declare in a declaratory judgment proceeding.....	69
VIII. Henry F. Grady, as Federal Reserve Agent, is a proper, although not an indispensable, party defendant	78
CONCLUSION	80

TABLE OF AUTHORITIES CITED

	PAGE
<i>Aetna Life Insurance Co. of Hartford v. Haworth</i> , 300 U. S. 227.....	67
<i>Altwater v. Freeman</i> , 319 U. S. 359.....	63
<i>Allen v. Hanks</i> , 136 U. S. 300.....	78
<i>American School of Magnetic Healing v. McAnnulty</i> , 187 U. S. 94.....	42
<i>Arenas v. United States</i> , 322 U. S. 419.....	32
<i>Bacon v. Federal Reserve Bank of San Francisco</i> , 289 Fed. 513.....	7
<i>Bailey v. Holland</i> , 126 F. (2nd) 317 (C. C. A. 4th, 1942)	37
<i>Barr v. Smith</i> , 201 Cal. 87, 255 Pac. 827.....	70
<i>Berdie v. Kurtz</i> , 75 F. (2nd) 898 (C. C. A. 9th, 1935)	39, 41, 44
<i>Black v. Little</i> , 8 F. Supp. 867.....	67
<i>Campbell v. Galeno Chemical Co.</i> , 281 U. S. 599.....	19
<i>Carroll v. Safford</i> , 3 How. 440 (U. S. 1845).....	78
<i>Castro v. Barry</i> , 79 Cal. 443, 21 Pac. 946.....	72, 74
<i>Colorado v. Toll</i> , 268 U. S. 228.....	39, 40, 42
<i>Columbia Broadcasting System v. United States</i> , 316 U. S. 407.....	64, 68
<i>Curren v. Wallace</i> , 306 U. S. 1.....	67
<i>Davis v. American Foundry Equipment Co.</i> , 94 F. (2nd) 441, (C. C. A. 7th, 1938).....	67
<i>Devine v. Los Angeles</i> , 202 U. S. 313.....	77
<i>Dewey & Almy Chemical Co. v. American Anode</i> , 137 F. (2nd) 68 (C. C. A. 3rd, 1943).....	67
<i>Dranga v. Rowe</i> , 127 Cal. 506, 59 Pac. 944.....	69
<i>Euclid v. Ambler Co.</i> , 272 U. S. 365.....	66
<i>Fidelity National Bank v. Swope</i> , 274 U. S. 123.....	67
<i>Fidelity Philadelphia Trust Co. v. Hines</i> , 10 A. (2nd) 553	26
<i>Gnerich v. Rutter</i> , 265 U. S. 388.....	39, 42
<i>Gully v. Interstate Natural Gas Company</i> , 82 F. (2nd) 145 (C. C. A. 5th, 1936).....	67

	PAGE
<i>Hamilton v. Elvidge</i> , 132 Cal. App. 21, 22 P. (2d) 239	73
<i>Hartmann v. Federal Reserve Bank of Philadelphia</i> , 55 F. Supp. 801.....	42
<i>Hassett v. Welch</i> , 303 U. S. 303.....	38
<i>Hiatt v. United States</i> , 4 Fed. (2nd) 374 (C. C. A. 7th)	58
<i>International Railway Co. v. Davidson</i> , 257 U. S. 506	19, 37
<i>Jellenick v. Huron Copper Mining Co.</i> , 177 U. S. 1.....	70
<i>Jewel Production Inc. v. Morgenthau</i> , 100 F. (2nd) 390 (C. C. A. 2d, 1938).....	39
<i>Koshland v. Helvering</i> , 298 U. S. 441.....	33
<i>Kittle v. Bellegarde</i> , 86 Cal. 556, 25 Pac. 55.....	69
<i>Lane v. Watts</i> , 234 U. S. 525.....	78
<i>Lewellyn v. Frick</i> , 268 U. S. 238.....	38
<i>Los Angeles v. Los Angeles Water Company</i> , 177 U. S. 558.....	73, 74
<i>Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.</i> , 234 U. S. 369.....	77
<i>Lynch v. Tilden Products Co.</i> , 265 U. S. 315.....	19
<i>Manhattan General Equipment Co. v. Commissioner of Internal Revenue</i> , 297 U. S. 129.....	18, 33, 37
<i>Marra v. Aetna Construction Co.</i> , 15 Cal. (2nd) 375, 101 P. (2d) 490.....	75, 76, 78
<i>Maryland Casualty v. Pacific Coal & Oil Co.</i> , 312 U. S. 270	67
<i>Miller v. Price</i> , 103 Cal. App. 650, 284 Pac. 1035.....	70
<i>Miller v. United States</i> , 294 U. S. 435,.....	19
<i>Moe v. Gier</i> , 116 Cal. App. 403, 2 P. (2d) 852.....	76
<i>More v. Steinbach</i> , 127 U. S. 70.....	77
<i>Morrill vs. Jones</i> , 106 U. S. 466.....	19, 42
<i>Nashville, Chattanooga & St. Louis Ry. v. Wallace</i> , 288 U. S. 249.....	59, 68
<i>National War Labor Board v. Montgomery Ward & Co. Inc.</i> , 144 F. (2nd) 528, (C. A., D. C. 1944).....	60
<i>Neher v. Harwood</i> , 128 F. (2nd) 846 (C. C. A. 9th, 1942)	39, 40, 41

	PAGE
<i>Nolan v. Morgan</i> , 69 F. (2nd) 471 (C. C. A. 7th, 1934)	37
<i>N. Y. and Puerto Rico S.S. Co., et al. v. United States</i> , 32 F. Supp. 538.....	67
<i>Osius v. Barton</i> , 109 Fla. 556.....	76
<i>Panama Refining Co. v. Ryan</i> , 293 U. S. 388.....	33, 38
<i>Panama Refining Co. v. Johnston</i> , 264 U. S. 375.....	37
<i>Pierce v. Society of Sisters</i> , 268 U. S. 510.....	67
<i>Redlands Foothills Groves v. Jacobs</i> , 30 F. Supp. 995, 1008	61, 62
<i>Rector of St. Stephens P. E. Ch. v. Rector, etc.</i> , 114 N. Y. Supp. 623.....	73
<i>Rector of St. Stephens P. E. Ch. v. Rector, etc.</i> , 201 N. Y. 1	73
<i>Schechter v. United States</i> , 295 U. S. 495.....	38
<i>Scott v. Alabama State Bridge Corporation</i> , 233 Ala. 12, 169 So. 273 (1936).....	63
<i>Smith Oyster Co. v. Darbee, etc. Co.</i> , 149 Fed. 555....	77
<i>Spring Valley Waterworks v. Bartlett</i> , 16 Fed. 615....	73
<i>Street v. Lincoln Safe Deposit Co.</i> , 254 U. S. 88.....	42
<i>Terrace v. Thompson</i> , 263 U. S. 197.....	67
<i>Title & Document Restoration Co. v. Kerrigan</i> , 150 Cal. 289, 88 Pac. 356.....	78
<i>United States v. Appalachian Power Co.</i> , 311 U. S. 377	65
<i>United States v. George</i> , 228 U. S. 14.....	33
<i>Vicksburg Waterworks Co. v. Vicksburg</i> , 185 U. S. 65	64
<i>Waite v. Macy</i> , 246 U. S. 606.....18, 19, 33, 42, 52, 60	
<i>Warner Valley Stock Co. v. Smith</i> , 165 U. S. 28.....	39, 42
<i>Webster v. Fall</i> , 266 U. S. 507.....	42
<i>Welsh v. Plumas County</i> , 22 Pac. 254.....	73
<i>Wickliffe v. Owings</i> , 17 How. 47 (U. S. 1854).....	77
<i>Williams v. Atlantic Coast Line R. R.</i> , 17 F. (2d) 17, (C. C. A. 4th, 1927).....	77
<i>Wolf v. Gall</i> , 174 Cal. 140, 162 Pac. 115.....	77
<i>Work v. Louisiana</i> , 269 U. S. 250.....	67

AUTHORITIES.

	PAGE
United States Constitution:	
Article I, Sec. 1, 8.....	2
5th Amendment	2
United States Code Annotated:	
Title 12, Chap. 3.....	6, 44
Title 12, Sec. 61.....	23
Title 12, Sec. 221(a).....	7
Title 12, Sec. 241.....	6
Title 12, Sec. 248.....	6, 27, 28, 29, 54
Title 12, Sec. 264.....	20, 27, 28, 29
Title 12, Sec. 282.....	7
Title 12, Sec. 283.....	71
Title 12, Sec. 286.....	71
Title 12, Sec. 289.....	51, 55
Title 12, Sec. 301.....	26, 27, 44
Title 12, Sec. 304.....	50
Title 12, Sec. 305.....	8, 45, 78
Title 12, Sec. 321.....	7, 14, 15, 19, 20, 22, 28, 45, 47
Title 12, Secs. 321-338.....	2, 15
Title 12, Sec. 322.....	18, 20, 21
Title 12, Sec. 327.....	15, 29, 30, 45, 47, 48, 49, 51, 55, 61
Title 12, Sec. 328.....	15, 16, 26, 30, 45, 48, 49, 51, 55, 61
Title 12, Sec. 329.....	16
Title 12, Sec. 330.....	25, 26
Title 12, Sec. 334.....	22, 54
Title 12, Sec. 337.....	22, 23, 24
Title 12, Sec. 338.....	15, 24, 28
Title 12, Sec. 341.....	7
Title 12, Sec. 371(c).....	24
Title 12, Sec. 486.....	24
Title 12, Sec. 502.....	71
Title 28, Sec. 41.....	2
Title 28, Sec. 111.....	2, 24
Title 28, Sec. 118.....	70
Title 28, Sec. 225(a) (d).....	2
Title 28, Sec. 400.....	2, 9, 46, 55

	PAGE
Code of Federal Regulations :	
Title 12, Part 208.....	79
31 Opinions of Attorney General.....	25
Regulations of Board of Governors, Regulation H.....	16, 17
California Code of Civil Practice, Sec. 738.....	6, 10, 50, 69, 70 71, 72, 75, 76, 77
California Act, 652a.....	34, 57
Annual Report of Board of Governors, 1943.....	30, 31
Borchard, Declaratory Judgments (2nd Ed.).....	62, 63
44 American Jurisprudence, Sec. 17.....	78
9 Brooklyn Law Review 1.....	62
25 California Law Review 565 (1937).....	70
51 Corpus Juris 141.....	75
Vom Baur—Federal Administrative Law, Vol. 1, Sec. 499	19
Vom Baur—Federal Administrative Law, Vol. 1, Sec. 500	37

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PEOPLES BANK,
Plaintiff,

against

FEDERAL RESERVE BANK OF SAN FRANCISCO, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM and HENRY F. GRADY, Federal Reserve Agent,
Defendants.

BRIEF FOR PLAINTIFF-APPELLANT.

This is an appeal by the Peoples Bank from portions of an order of the District Court for the Northern District of California, Southern Division, entered November 17, 1944, in so far as the order, among other things, granted the motion of the defendant, Federal Reserve Bank, to dismiss the complaint, and granted the motion of Henry F. Grady, Federal Reserve Agent, to dismiss the complaint against him and dismissed the complaint (R., pp. 165, 166, 148). The said order also granted the motion of the Board of Governors of the Federal Reserve System to dismiss the complaint against it; but no appeal has been taken from this order. Said order also granted the motion of the defendant Federal Reserve Bank for an order dismissing the motion of the plaintiff for a summary judgment. No appeal has been taken from that order. The only question before the Court on the appeal of the plaintiff is whether the complaint was properly dismissed as to the Federal Reserve Bank and the Federal Reserve Agent.

The said order also denied the motion of the Reserve Bank for a summary judgment; and the Reserve Bank has appealed from this denial.

Statement.

By its complaint, the plaintiff, pursuant to the provisions of Sec. 400 of Title 28, U.S.C.A., seeks a declaratory judgment to the effect that condition No. 4 (see p. 3, *infra*) attached to its permit to acquire stock in the defendant Reserve Bank, is invalid. The prayer of the complaint also asks for a temporary and a permanent injunction, but these are incidental measures of relief which, presumably, will not need to be invoked. The case should be viewed as a simple suit for a declaratory judgment. The matter came before the District Court on the motions of the three defendants to dismiss the complaint (all of which motions were granted), and on the motion of the Reserve Bank for a summary judgment, which was denied.

The defendant Board of Governors of the Federal Reserve System (sometimes hereinafter referred to as the Board) moved to dismiss the complaint on the ground that jurisdiction had not been obtained over it, inasmuch as, according to its claim, it was an "inhabitant" of the District of Columbia, and consequently could not be sued in the United States District Courts of California. Since no appeal is taken by the plaintiff-appellant from the order of the Court dismissing the complaint as to the Board of Governors, and since, as we shall herein contend, the Board of Governors is not an indispensable party, the plaintiff-appellant proposes to proceed against the remaining parties under the provisions of Section 50 of the Judicial Code, 28 U.S.C.A. Sec. 111.

Jurisdiction. The jurisdiction of the District Court was based on Secs. 1 and 8 of Article 1 and the Fifth Amendment to the Constitution, and under Sec. 9 of the Federal Reserve Act, as amended (12 U. S. C. A., 321-338, inc.); Secs. 24 (1)(4) and 274d of the Judicial Code (28 U. S. C. A., 41, 400 and Sec. 25(b) of the Federal Reserve Act, as amended (see Pars. I and II of the Complaint, R., p. 3). The jurisdiction of this Court is based on 28 U. S. C. A., Sec. 225(a) and (d).

The complaint (R., pp. 3-11) alleges that the plaintiff is a California state bank and a member of the Federal Reserve System; that the defendant Federal Reserve Bank is the Federal Reserve Bank in the 12th Reserve District, having its office in San Francisco, and that the defendant Henry F. Grady is Chairman of the Board of that bank and is the Federal Reserve Agent located at that bank. That on November 28, 1941, the plaintiff, then being desirous of becoming a member of the Federal Reserve System, made application to the Board of Governors of the Federal Reserve System, under the applicable rules and regulations of the Board, for the right to subscribe to the stock of the defendant Reserve Bank, and that on May 6, 1942, the Board of Governors granted this application, subject to certain conditions, among which was the following:

“4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of American National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System.”

The complaint then alleges (Paragraph V) that thereafter and on May 7, 1942 the *defendant Reserve Bank** “informed the plaintiff that as a condition to its subscribing to the stock of the defendant, Federal Reserve Bank of San Francisco, *it would be required by said Bank* to accept the said condition No. 4 and to agree to comply with the same and all thereof, said acceptance of said agreement to be evidenced by a resolution of its board of directors.”

* Italics in this brief ours, unless otherwise noted.

Thereafter, on May 12, 1942, the plaintiff being desirous of acquiring the said stock in the defendant Reserve Bank and becoming a member of the Federal Reserve System "and under the compulsion of the said requirement of said defendant, did, by resolution of its board of directors, accept the said condition No. 4, and agreed to comply with the same". That thereafter, 34 shares of the capital stock of the defendant Bank were paid for by and were issued to the plaintiff, and that the plaintiff is now the owner of said shares.

The complaint then alleges (Paragraph VI) that on February 17, 1944, without the assistance or prior knowledge of the plaintiff, said Transamerica Corporation became the owner of 500 shares out of the 5,000 shares of the capital stock of the plaintiff, which 500 shares have been transferred into the name of and issued to said Transamerica Corporation; and, on information and belief, that the acquisition of said shares was made without the written approval of the Board of Governors of the Federal Reserve System, and falls within the purview of condition No. 4.

The complaint then alleges that on April 4, 1944, the plaintiff notified the Board of Governors of said acquisition of stock by Transamerica and goes on to state as follows:

"VIII.

"Defendants assert and contend that said condition No. 4 is in all respects valid and enforceable against the plaintiff and empowers the defendant, Federal Reserve Bank of San Francisco, to cancel the shares of said bank owned by plaintiff and to terminate plaintiff's membership in the Federal Reserve System; upon information and belief, plaintiff alleges that defendants intend to and will, unless restrained, take proceedings, predicated on said condition No. 4, designed to deprive plaintiff of its ownership of said shares of defendant, Federal Reserve Bank of San Francisco, and of membership in the Federal Reserve System, and of all the benefits thereof, to the great and irreparable injury and damage of plaintiff, and that such proceedings are imminent.

“Plaintiff on the contrary asserts that the requirement by defendants, that as a condition precedent to the acquisition of stock of defendant, the Federal Reserve Bank of San Francisco, plaintiff should accept the said condition 4 and agree to comply therewith, is in all respects without authority in law, and is unreasonable, arbitrary, capricious and discriminatory, and is invalid, null and void.

“Plaintiff further asserts that defendants, or any of them, have no power or authority to take any proceedings predicated on said condition No. 4, designed to deprive plaintiff of its ownership of shares of the defendant, the Federal Reserve Bank of San Francisco, and of membership by the plaintiff in the Federal Reserve System; plaintiff further asserts that said void condition No. 4 is a cloud upon the title to the said shares of defendant, the Federal Reserve Bank of San Francisco, owned by plaintiff.”

The complaint then alleges (Paragraph IX) that “by reason of the premises there exists between the parties to this action an actual, justiciable controversy within the purview of the Federal Declaratory Judgment Act” and that the “plaintiff is entitled to have its rights adjudged and declared in this action”.

The complaint alleges generally that the said condition No. 4 is invalid, null and void (Paragraph IV).

As above stated, the principal prayer of the complaint is that the Court adjudge “the rights and legal relationships of the plaintiff and the defendants in the premises” and declare that said condition No. 4 is unauthorized by law and beyond the power of the defendants or any of them to impose, and is invalid, null and void.

Specification of Errors of District Court.

The District Court bases its decision as respects the motion of the defendant Reserve Bank on four grounds (R. p. 149):

1. That the Board of Governors is an indispensable party over which the District Court has no jurisdiction;

2. That no justiciable controversy, in a legal sense, exists between the plaintiff and the Reserve Bank.

3. That in view of the fact that the Board of Governors had not yet taken any action to enforce condition No. 4, the suit was premature;

4. That a case was not made out by the complaint for the removal of an adverse claim or cloud on title under the provisions of Section 738 of the Code of Civil Procedure of California.

The District Court bases its decision as respects the motion of the defendant Grady on two grounds (R. p. 155):

1. That the Board of Governors is an indispensable party; and

2. That there is no justiciable controversy between the Reserve Agent and the plaintiff.

In all of the foregoing determinations, we respectfully submit that the District Court was in error.

What Constitutes the Federal Reserve System.

Title 12, of the United States Code concerns "Banks and Banking". Chapter 3 of Title 12 deals with the "Federal Reserve System". The "Federal Reserve System," so-called, is composed of the following:

A. The Board of Governors of the Federal Reserve System. This is an administrative board (Sec. 241, Title 12) having "Enumerated Powers" (Sec. 248, Title 12), but no grant of any general authority.

B. The Federal Reserve Banks. There are twelve federal reserve banks, one for each federal reserve district. The federal reserve banks are straight-out corporations, having the power to adopt a seal, make contracts, to sue and be sued, complain and defend in any court of law or equity. Each reserve bank is given the power:—"to exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of

this chapter, and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this chapter'' (Sec. 341, Title 12). Each reserve bank can be sued only in the district of its location *Bacon v. Federal Reserve Bank of San Francisco*, 289 Fed. 513.

C. Member Banks, of which there are two kinds: (1) national banks and (2) state banks. In order to be a "member bank", the national bank and the state bank must become stockholders of the reserve bank for the district in which they are located. *Such stock ownership is the sole qualification.*

It is compulsory for national banks to become stockholders of the federal reserve bank of their respective districts (Sec. 282, Title 12). *The Board of Governors has nothing to say about it, irrespective of whether any of the stock of the national bank is held by any other corporation whatsoever.* State banks become member banks only of their own volition. Before a state bank can become a stockholder of its local reserve bank, it must apply to the Board for a permit to acquire the stock. Its eligibility is governed by the statutes (Sec. 321, Title 12).

Holding Company Affiliates. The statute has elaborate provisions with respect to "affiliates" of member banks, including "holding company affiliates". These constitute, in general, companies which own either a majority of the shares of capital stock of a member bank or more than 50% of the number of shares voted for the election of directors of any one bank at the preceding election, or which control in some manner the election of a majority of the directors of any one bank. (Sec. 221(a), Title 12.) The right to vote its stock in a member bank held by a holding company affiliate is subject to the obtaining of permission from the Board of Governors of the Federal Reserve System. *There are no restrictions in the banking law or otherwise upon the unqualified right of a holding company to acquire stock in a state bank, either a member bank or a non-member bank.* Such holding company affiliates are under limited examination and supervision of the Board, but they are

not, in a strict sense, embraced within the Federal Reserve System.

D. Federal Reserve Agent. The statute provides that one of the Class C directors of a reserve bank (all of which Class C directors shall be appointed by the Board) shall be designated as Chairman of the board of directors of the Federal Reserve Bank, and as "Federal Reserve Agent", and that "in addition to his duties as chairman of the board of directors of the Federal Reserve Bank he shall *be required to maintain, * * * a local office of said Board on the premises of the Federal Reserve Bank.* He shall make regular reports to the Board of Governors of the Federal Reserve System and *shall act as its official representative for the performance of the functions conferred upon it by this chapter*" (Sec. 305, Title 12).

Summary of Argument.

I. Condition No. 4 is invalid, because it is without warrant or authority in law. The condition is not only not authorized by the statute but is in direct contravention of many statutory provisions. The invalidity of condition No. 4 does not arise from any abuse of discretion, but arises from a total lack of authority in the Board to impose it.

II. The condition is invalid because arbitrary, unreasonable, unjust and discriminatory.

III. The condition is unconstitutional.

IV. The Board of Governors is not an indispensable party.

This is simply a case where a governmental agency, the Reserve Bank (which asserts that it is a mere subordinate), threatens to take action against the plaintiff in the attempted enforcement of an invalid special regulation which neither the superior nor the inferior agency had any authority whatsoever to impose. Under those circumstances the superior is not a necessary party to a suit

against the subordinate. Every person who attempts or threatens to enforce the invalid regulation is a wrongdoer who can be sued separately for his own wrong. He is a trespasser.

V. There is a "justiciable controversy", within the meaning of the Declaratory Judgment Statute (Sec. 400 of Tit. 28), between the plaintiff and the Reserve Bank.

The defendant Reserve Bank has many important steps to take in any effective enforcement of Condition No. 4, and it intends to take these steps. A justiciable controversy is clearly alleged in the complaint. In the District Court, the Reserve Bank contended that it had no power under the law to impose conditions and no power to enforce Condition No. 4, and that as a matter of fact it had nothing to do with the imposition of the condition and did not intend to have anything to do with the enforcement of the condition. Obviously the contention that, in fact, it had nothing to do with the imposition or the enforcement of the condition is not open to it on the motion to dismiss, in view of the allegations of the complaint. Further, the contention is not in accordance with the realities. In the very nature of the situation the condition itself requires severance by the Reserve Bank of corporate relations between the plaintiff and the defendant bank—a corporate act.

VI. This suit, as a suit for a declaratory judgment, is timely. On the admitted allegations of the complaint, proceedings to enforce Condition No. 4 "are imminent".

Further, a suit for a declaratory judgment is an appropriate proceeding in which a party confronted by a governmental imposition which he believes to be invalid may have a present ascertainment of his rights as a guide to his future conduct. The complaining party in such a proceeding does not have to show that he is threatened with the imminent enforcement of the invalid regulation or condition, nor does he have to allege or show that he would suffer irreparable damage therefrom (as he would have to do in an injunction suit). Nor does he have to sit around with a sword of

Damocles hanging over his head, awaiting the pleasure of the governmental agency as to when, if ever, it will seek to enforce the condition. In view of the acquisition of stock in the plaintiff by Transamerica, the existence of this condition No. 4 is, at present, very detrimental to plaintiff's status and business. It is of great practical importance to the plaintiff to know, right now, where it stands.

VII. The claim of the Board of Governors and of the defendant Reserve Bank of a right to deprive the plaintiff of its stock in the defendant Reserve Bank by an enforcement of Condition No. 4 is an adverse claim within the purview of Section 738 of the Code of Civil Procedure of California, the existence of which adverse claim the Federal Court in this case can ascertain and declare in a declaratory judgment proceeding.

This is an additional and sufficient ground for giving relief to the plaintiff. The reasons given by the District Court for deciding against plaintiff-appellant on this point are, we respectfully submit, without merit. *No contention can be made that a proceeding to "determine" an adverse claim is premature.* A plaintiff confronted with an adverse claim to his property is entitled to have it determined at any time, irrespective of whether he is confronted with any threat of action, immediate or otherwise, by the holder of the adverse claim. The facts are *now present* upon which the purported right to terminate the plaintiff's property right may be exercised.

VIII. Henry F. Grady, as Federal Reserve Agent, is a proper although not an indispensable party defendant.

Some Preliminary Observations.

The case arises out of the following circumstances:

The plaintiff bank, as a newly incorporated state bank, desired to begin its business as a member of the Federal Reserve System. This would entitle it to insurance of its

deposits under the deposit insurance provisions of the Federal Reserve Act. To be a member bank, the sole requirement of the law was that it should become a stockholder of the defendant reserve bank. In order to become such stockholder, it had to obtain a permit therefor from the Board of Governors of the Reserve System. It applied for such a permit and was found to be fully qualified from every standpoint, and the permit was granted. The Board of Governors apparently having adopted a policy (for which there was no warrant in law) of limiting the acquisition by Transamerica of further bank stocks, sought to accomplish this limitation by the strange invention of Condition No. 4. This condition provides that if a single stockholder of the plaintiff bank sells one of its shares of stock to Transamerica then the bank loses its right of membership in the System and its status as an insured bank. The expansion of Transamerica is not prevented because it continues to hold the stock it bought. Nevertheless, the plaintiff bank is penalized for something over which it had no control and which had nothing to do with its soundness as a bank or the propriety of its membership in the system.

Plaintiff is a stockholder in the defendant Reserve Bank. Condition No. 4 most seriously and detrimentally affects its ownership of that stock and plaintiff's relationship to the Reserve Bank as a holder of that stock. The suit is simply a suit to determine the validity of condition No. 4 as affecting the plaintiff's ownership of that stock. The controversy is between a stockholder and his corporation.

A mere reading of this condition shocks one's sense of propriety. Can it be possible for plaintiff bank to lose its valuable membership in the Federal Reserve System and its practically indispensable status as an insured bank (both of which would follow from the enforcement of the condition) because, without its knowledge and without any power on its part to control the transaction, one of its stockholders sold a small block of stock to Transamerica? The condition likewise would become operative even if one small stockholder of the plaintiff should obtain a loan on his stock from the Bank of America. The loan may have been obtained

from a branch of the Bank of America whose officers knew nothing of the condition, and the stockholder himself may not have known of the condition.

A "mere reading" of the condition shows that it is *a clear case of unauthorized and arbitrary special regulation*, a regulation that is manifestly in direct conflict with express legislation. To make it was a species of petty tyranny. It is plainly an attempt to do by indirection and trick, that which the Board admittedly could not do directly; to wit, limit the acquisition by Transamerica of bank stock.

There are approximately 2750 state banks that are members of the Federal Reserve System. Our assertion in the District Court that no other state bank has been subjected to any condition faintly resembling condition No. 4 was not challenged. *The plaintiff bank has been singled out as the only bank that may lose its membership in the Federal Reserve System and its status as an insured bank, because one of its stockholders, over whom it has no control, may sell a share of its stock to a particular holding company.* The shares could, with propriety, have been sold to a felon or a professional gambler but not, it seems, to a regulated holding company.

It is obvious that, in condition No. 4, we do not have to do with any attempted regulation of a small bank in Lakewood Village, designed to insure that the bank shall be a sound bank, and shall conduct its business according to sound practices. Condition No. 4 is designed solely to prohibit any extension of the banking interests of Transamerica Corporation. This is a matter as to which the plaintiff bank, as a bank and as a member of the Federal Reserve System, has no control and no self-interest and the defendants no power. Though absurd and futile on its face, because the Board cannot prevent such acquisition even in a single bank, the validity of the condition must, nevertheless, be examined in the light of this manifest objective and the utter lack of legislative authority to achieve it.

An outrageous feature of condition No. 4 is that the plaintiff bank has no control whatsoever over the ful-

fillment thereof. The stockholders of the plaintiff bank have an absolute right to sell their stock to whomsoever they please, including Transamerica, and to do so without the knowledge or consent of the plaintiff, and without obtaining the permission of any public agency. That is what has happened in this case and yet under this condition all of the other stockholders and the depositors of the bank are put in jeopardy of the bank's losing its position as a member of the Federal Reserve System and its status as an insured bank, although the bank may continue to be one of the safest and soundest banks in the country. Meanwhile, Transamerica may have purchased a million shares in other banks without jeopardizing the membership or insurance of any of them.

Under the decision of the District Court, the plaintiff, at the present time, is remediless. It must remain for months or for years under the cloud of this condition No. 4 without knowing whether the present Board or any successor Board is going to seek to enforce it, and yet without means to determine what its rights are until confronted with an actual attempt at enforcement. Even then, according to the District Court, it cannot have its rights with respect to its stock in the defendant bank determined in a suit against the defendant bank in its home jurisdiction of California, but must be put to the trouble and expense of suing the Board of Governors in the District of Columbia. This, we submit, is not the law, and constitutes a travesty on justice.

As we hereinafter show (*infra* p. 56 *et seq.*), a present determination of the validity or invalidity of condition No. 4 is of the utmost practical importance to the plaintiff bank. We are not involved in this case in an academic discussion of theoretical rights.

The defendants, in the Court below, refused to deal with the merits of the case. They refused to discuss the validity of the condition. The tyranny involved in the imposition of this condition is matched by the conduct of the defendants in seeking to avoid a determination on the merits.

POINTS

I.

Condition No. 4 is invalid because there is no warrant or authority in law for the imposition of any condition remotely resembling that condition.

That there was no authority in the Board of Governors to impose Condition No. 4 is so clear that there was no endeavor on the part of the Board or any of the defendants in the District Court to support its validity. In fact counsel for the Board made the following statement in his oral argument in the District Court:

“For proper disposition of each of the motions before this court, it may be assumed, for the sake of argument, that the condition is invalid, and still the motion should be sustained (R., p. 125).*

(1) *The Board has power to attach only such conditions to its permit as are authorized by statute. No authority can be found in the statute for condition No. 4.*

The source of authority in the Board to impose any conditions upon the acquisition by an applicant state bank of stock in a reserve bank is found in Section 321 of Title 12, reading in part as follows:

A state bank * * * “desiring to become a member of the Federal reserve system, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. * * * The Board of Governors of the Federal Reserve System, subject to the provisions of this title and to *such conditions as*

* The Record would make it appear as if Mr. Owen made this statement. It was actually made by Mr. Leachman, counsel for the Board of Governors.

it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank”.

The question is, therefore, what conditions can the Board validly prescribe as being conditions prescribed “pursuant” to (i.e. authorized by) the provisions of Title 12?

The action of Congress with respect to Section 321 makes it very clear that Congress intended that the Board should not have authority to roam at large in the prescription of conditions. As this section was originally worded, it provided in broad language as follows (40 Stat. 233):

“The Federal Reserve Board, subject to such conditions as it may prescribe, may permit the applying bank to become a stockholder” (Public Law No. 25, 65th Congress, approved June 21, 1917).

By Public Law No. 639 of the 69th Congress, approved February 25, 1927, the section was amended to read as it now does. In other words, Congress having originally granted to the Board very broad powers to prescribe conditions, saw fit to restrict these powers by the clear language of the section as it now reads, thereby requiring the Board to find express authority in the statute itself for such conditions as it might prescribe.

Further emphasis of the fact that the Board of Governors may not roam at large in imposing conditions, but must look to the authority granted by the statute, is given by Sections 327 and 328 of Title 12. Both sides agree that the only source of power in any body to enforce a condition that has been imposed upon an applicant bank and which comes into effect subsequent to its becoming a member, is found in Section 327. This section reads as follows:

“If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank *has failed to comply with the provisions of sections 321-338, inclusive*, of this title, or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto,

* * * it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank * * *. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions *imposed by said sections.*”

It is noteworthy that this section authorizes the Board to exercise compulsion upon an offending bank only for failure to “comply with the provisions of sections 321 to 338”. This thought is emphasized by the provision in the last sentence that proof of compliance with the *statute* entitles the erring bank to restoration to membership.

Further emphasis is given to the necessity for “authority of law” being found for a condition, by the provisions of Section 328, reading in part as follows:

“Whenever a member bank shall surrender its stock holdings in a Federal reserve bank, or *shall be ordered to do so* by the Board of Governors of the Federal Reserve System, *under authority of law*, all of its rights and privileges as a member bank shall thereupon cease and determine, and * * *”.

An example of the type of conditions which the Board is authorized to attach to its permit “pursuant” to Title 12 is indicated in Section 329(a) of Title 12. In that section the Board is authorized to admit a state bank to membership with less capital than the statute ordinarily requires (see Section 329); but in so doing, the Board was given the power “in its discretion” to require such bank to increase its capital and surplus. Here the exercise of a “discretion” is authorized. The applicant’s continued membership may doubtless be conditioned upon meeting the Board’s requirement as to increase.

By Regulation H, Section 6, the Board has established three standard conditions to be attached to every permit and consequently, in fact, attached to the permit given to the plaintiff. But these standard conditions are nothing more nor less than the Board’s paraphrase of the requirements of the statute, and therefore place no restrictions

upon the conduct of the member bank other than those that the statute itself requires.

In Regulation H, Section 6, the Board states that “*pursuant to the authority contained in the first paragraph of Section 9 of the Federal Reserve Act*”, viz: Section 321 of Title 12, U. S. C. A., “the Board * * * will prescribe the following conditions of membership for each State Bank hereafter applying for admission to the Federal Reserve System, and, in addition, such other conditions as may be considered necessary or advisable in the particular case”. In the District Court, the Reserve Bank argued that condition No. 4 is one of “such other conditions” which the Board believes “necessary or advisable in the particular case.” It is to be noted, however, that the Board, in Regulation H, Section 6, quotes as the source of its authority for the regulation, the limiting language of the statute, to wit, that the conditions must be such as “it may prescribe pursuant thereto”. So the Board, in adopting the regulation clearly contemplated that these “other conditions as may be necessary or advisable in the particular case”, must be conditions that are authorized by statute. In other words, in adopting this regulation, the Board was not seeking to enlarge its power to impose conditions. The result therefore is that, notwithstanding this reservation by the Board, in its regulations, of the right to impose “such other conditions”, we are right back on the question as to whether the particular other condition was one which was authorized by the statute.

If a condition is not one that has been expressly authorized by the provisions of Title 12, if the statute is absolutely silent on any such a condition, how could it be said that a condition in no way envisaged by any provision of Title 12 was a condition prescribed “pursuant thereto”. For example, assume that the Board might deem it a wise policy, in order to assure continued good management of a bank, that no president should be chosen by the directors of a bank without the prior approval of the Board. At least one of the matters which the Board is required to look into as a prerequisite to granting an application is the charac-

ter of the management of the bank (Section 322). Yet we do not believe that any one would be bold enough to assert that the prescription by the Board, as a condition of the granting of an application, that it should have to approve each and every president before elected, would be deemed to be a condition prescribed pursuant to the provisions of Title 12.

The law is too well settled for argument that a regulation (and the same rule applies to a condition in a particular case) must be in harmony with the statute in order to be valid. As the Court said in *Manhattan General Equipment Company v. Commissioner*, 297 U. S. 129, 56 Sup. Ct. 397, 8 L. Ed. 528 at page 134:

“The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 320-322; *Miller v. United States*, 294 U. S. 435, 439-440, and cases cited.”

The Court decided in the *Manhattan* case that the regulation in question was invalid because both inconsistent with the statute and unreasonable.

In *Waite v. Macy*, 246 U. S. 606 (1918), the plaintiff sought an injunction to prevent the appellants, as constituting the board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiff tests which it was alleged were illegal and which, if applied, would lead to the exclusion of the tea. The Court found that the regulation established a ground for exclusion of the tea not recognized by the statute and therefore sustained the injunction, saying, at page 610:

“The Secretary and the board must keep within the statute, *Merrit v. Welsh*, 104 U. S. 694, which

goes to their jurisdiction, see *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544 * * *”.

In *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267 (1882) Jones sued Morrill, a collector of customs, to recover duties paid under protest. The statute provided that animals imported for breeding purposes should be admitted free, under such regulations as the Secretary of the Treasury might prescribe. The Secretary had adopted a regulation providing that the collector should “be satisfied that the animals are of superior stock”. The court held that the regulation was in excess of the power of the Secretary and invalid.

It is to be noted that neither in *Waite v. Macy*, *supra*, nor in *Morrill v. Jones*, *supra*, was the Secretary of the Treasury a party defendant to the suit. In both cases the subaltern, alone, was sued.

Accord:

Campbell v. Galeno Chemical Co., 281 U. S. 599, at 610 50 Sup. Ct. 85, 74 L. Ed. 607 (1930);

International Railway Co. v. Davidson, 257 U. S. 506, 42 Sup. Ct. 506, 66 L. Ed. 341 (1922);

Miller v. U. S., 294 U. S. 435, 55 Sup. Ct. 440, 79 L. Ed. 977 (1935);

Vom Baur Federal Administrative Law, Vol. 1, Section 499;

Lynch v. Tilden Produce Co., 265 U. S. 315, 44 Sup. Ct. 488, 68 L. Ed. 1034 (1924).

(2) *The statute prescribes with considerable particularity the factors to be considered by the Board in passing upon an application under Sec. 321. The Board, in passing upon a state bank's application, has no authority to “consider” whether its stock is then or may thereafter be held by a holding company.*

The statute expressly provides for the matters which the Board must take into consideration in passing upon the

application of a state bank for permission to acquire stock in a reserve bank. The section of Title 12 following Section 321, is headed "Determination on Application" (Sec. 322). It is therein provided:

"In acting upon such application the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this chapter".

Upon becoming a member bank, the applying state bank, *ipso facto*, becomes an insured bank under that part of the Federal Reserve Act which creates the Federal Deposit Insurance Corporation, and in which it is provided as follows (Sec. 264 of Title 12, subsec. (e), paragraph (2)):

"After August 23, 1935 * * * every state bank * * * which becomes a member of the Federal Reserve System, shall be an insured bank from the time it * * * becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation" (viz: Federal Deposit Insurance Corporation) "by the Board of Governors of the Federal Reserve System in the case of such State member bank * * *. Such certificate shall state that the bank * * * is a member of the Federal Reserve System in the case of a State member bank, and that consideration has been given to the factors enumerated in subsection (g) of this section".

Subsection (g) reads as follows:

"The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors [of the Federal Deposit Insurance Corporation] under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section."

By the application of the doctrine *expressio unius exclusio alterius*, it would thus appear that the only factors to be taken into account by the Board in passing upon the application of a state bank for permission to become a stockholder, are the factors expressed in Section 322 and in subsection (g) of Section 264. "The conditions pursuant thereto" which the Board of Governors may prescribe in permitting an applying bank to become a stockholder must, in the absence of other prescribed conditions of the statute (and there are none), have to do with the matters which the Board is required by other sections to "consider" in passing upon the application of the applying bank. Consequently, since these matters to be considered have no connection, even remote, with stock ownership it can be stated with conviction that neither the Board nor the Reserve Bank had authority to consider and then impose conditions affecting stock ownership in the applying state bank by a holding company.

(3) *Not only is there no authority in the statute for condition No. 4, but it is in direct conflict with several provisions of the statute.*

(a) First, it runs counter to a number of provisions expressly contemplating that the stock of a state member bank may be held by a holding company affiliate. Referring to the very elaborate provisions with respect to the powers given to the Board over holding company affiliates of member banks, it will be seen that the Board has no power to exclude *a national bank* from membership in the system, because of the ownership of any of its stock by a holding company. Since national banks and state member banks are, under the statute, to have an identical status as members of the reserve system, the Board, therefore, has no power to exclude a state bank from membership because of the fact, if such be the fact, that, *at the time of its application*, all or any portion of its stock was owned by a holding company. Much less would it have power subsequently to remove it for that reason.

There are a number of sections of the statute which give clear recognition to the propriety of the stock of a state member bank being owned by a holding company. Section 304 of Title 12, with respect to voting for Class A and Class B directors of the Federal Reserve Bank, provides that:

“whenever any two or more member banks within the same Federal reserve district are affiliated with the same holding company affiliate, participation by such member banks in any such nomination or election shall be confined to one of such banks, which may be designated for the purpose by such holding company affiliate.”

Section 334, Title 12, which is one of the sections of that portion of the Act which specifically applies to “State banks as members of the System” provides that with respect to state member banks admitted to membership under Section 321, reports shall be obtained containing such information as in the judgment of the Board of Governors shall be necessary “to disclose fully the relations between such affiliate and such bank and to enable the Board to inform itself as to the effect of such relation upon the affairs of such bank”. The Section also provides that the term “affiliate” shall include holding company affiliates, as well as other affiliates.

There is, also, a general provision with respect to holding company affiliates of state member banks, to wit, Section 337, reading as follows:

“Each State member bank affiliated with a holding company affiliate shall obtain from such holding company affiliate, within such time as the Board of Governors of the Federal Reserve System shall prescribe, an agreement that such holding company affiliate shall be subject to the same conditions and limitations as are applicable under section 61 of this title, in the case of holding company affiliates of national banks. * * * Whenever the Board of Governors of the Federal Reserve System shall have revoked the voting permit of any such holding company affiliate, the Board of Governors of the Federal Reserve System may, in its discretion, require any

or all State member banks affiliated with such holding company affiliate to surrender their stock in the Federal reserve bank and to forfeit all rights and privileges of membership in the Federal Reserve System as provided in sections 321-338 of this title.”

Section 61, of Title 12 of the U. S. C. A. (R. S. 5144) provides for a holding company affiliate entering into certain agreements in connection with its application for a voting permit but it is not required to enter into any agreement to limit its right to acquire stock in any bank—*expressio unius exclusio alterius*. It is expressly provided in Section 61 that “if at any time it shall appear to the Board of Governors of the Federal Reserve System that any holding company affiliate has violated any of the provisions of the Banking Act of 1933 or of any agreement made pursuant to this Section, the Board of Governors of the Federal Reserve System may, in its discretion, revoke any such voting permit after giving sixty days’ notice to the holding company affiliate by registered mail of its intention so to do and affording it an opportunity to be heard”.

Since the Banking Act expressly provides that a state member bank shall bind its holding company to an agreement that it shall be subject to the “*same conditions and limitations*” as are applicable in the case of holding company affiliates of national banks and since the agreements the holding company is required to enter into with the national bank are expressly enumerated and clearly do not include anything relating to the purchase of stock or the quantum thereof in such or any other bank (see Sec. 61 of Title 12, U. S. C. A. (R. S. 5144)), it is clear to a demonstration that the attempt to impose additional burdens upon a state bank in this respect is in derogation of the statute (Sec. 337 above). The statute obligates the member bank to obtain an agreement from the holding company and it, and necessarily the bank also, shall be subject to the “*same conditions and limitations as are applicable in the case of holding company affiliates of*

national banks''. This is further rendered even more certain by the provision quoted above (Sec. 337) which shows that for a violation by the holding company affiliate (Secs. 337 and 61, Title 12, of the U. S. C. A., R. S. 5144) the Board of Governors is authorized to revoke the voting permit for a "violation of any agreements made pursuant to the section or of the Banking Act of 1933" and when revoked, the Board is expressly authorized to "require any or all state banks affiliated with such holding company affiliate to surrender their stock in the Federal Reserve Bank and to forfeit all rights and privileges of membership in the Federal Reserve System as provided in this Section."

The propriety of the existence of holding company affiliates of State member banks is further recognized in:—

Section 338, which has to do with the examination of such affiliates by examiners selected by the Board.

Section 371(c) which provides that no member bank shall make loans to or purchase the securities of affiliates or accept the same as collateral, except under certain conditions and within limitations therein prescribed.

Section 337 which expressly prohibits a member bank having affiliation with any corporation, etc., engaged principally in the issue of flotation of securities. Under the doctrine of *expressio unius exclusio alterius*, this would permit affiliation with other types of corporations.

Section 486 which provides for the waiver of requirements as to reports from affiliates in certain cases.

From these statutes three things, at least, are apparent:—

1. That a bank holding company is recognized by law as a legitimate organization which may freely operate under a strictly limited supervision of the Board of Governors of the Federal Reserve System.

2. That no power exists in the Board of Governors to place any restriction whatsoever on the acquisition by a holding company of any amount of stock in either a state member bank or a national bank.

3. That a state bank is entitled to membership in the Federal Reserve System on the *same terms and conditions* as a national bank.

In the face of all these provisions, it is clear that as one of the “conditions * * * *pursuant thereto*” which the Board of Governors may prescribe in connection with its permit to an applying state bank to become a stockholder, it cannot prescribe that the state bank shall not have a holding company affiliate. Congress has clearly recognized that this is beyond the control of the Board and of the Reserve Bank. Obviously, the greater includes the lesser, and therefore it is clear that the Board may not prescribe that if any of the stock (no matter how little) of the applying state bank shall subsequently be acquired by a holding company, the bank may lose its rights as a member bank.

(b) Another provision of the statute to which the imposition of a condition such as condition No. 4 runs squarely counter is found in Section 330, Title 12, U. S. C. A., reading:

“Subject to the provisions of this chapter and to the regulations of the board made pursuant thereto, any bank becoming a member of the Federal Reserve System shall retain its full charter and statutory rights as a State bank or trust company, and may continue to exercise all corporate powers granted it by the State in which it was created, and shall be entitled to all privileges of member banks: * * *.”

But one of the “charter and statutory rights” which it has as a state bank is that its stock may be held without restriction by any holder of any kind whatsoever. The laws of California impose no restrictions whatsoever upon the ownership of stock of the Peoples Bank by Transamerica, or any other company. In this connection, see the illuminating opinion of Acting Attorney-General John W. Davis in 31 Opinions of the Attorneys General 153, in the matter of state banks joining the Federal Reserve System. Further, it is a “privilege”, certainly, of national member banks, to have the stock thereof owned in part or in whole by a hold-

ing company. That being a privilege of a national member bank, it is, by virtue of Section 330 also a privilege of a state member bank.

(c) Another provision of the statute to which the imposition of condition No. 4 runs counter is the provision of Section 328 of Title 12, which authorizes state member banks "desiring" to withdraw from the system to do so. Condition No. 4 is a requirement that the plaintiff bank will, to quote the condition, "withdraw from membership", not when it so desires, not when its then board of directors finds it in its interest to do so, but, due to a condition imposed on it in May, 1942, when through some circumstances over which it has no control, to wit, the acquisition by Trans-america of some stock therein, the Board of Governors requests it to withdraw. That which is *voluntary* under the statute is sought to be made *compulsory* by the condition. "The membership of a state bank in the Federal Reserve System is * * * purely voluntary both in its inception and duration" (*Fidelity-Philadelphia Trust Co. v. Hines*, 10 A. (2d) 553, 337 Pa. 48 (Sup. Ct. Pa., 1940).

Upon examination, it will be seen that this compulsory withdrawal provided for by condition No. 4 is not in conformity with Section 328 in a number of other respects.

(d) Still another provision of the statute to which condition No. 4 runs counter is the provision of Section 301 of Title 12 reading in part as follows:

"Every Federal reserve bank shall be conducted under the supervision and control of a board of directors. * * * Said board of directors shall administer the affairs of said bank fairly and impartially and *without discrimination* in favor of or against any member bank or banks * * *."

The Reserve Bank contended in the District Court that Section 301 has no applicability because it only has to do with "plaintiff's treatment as a member bank", and the condition was exacted "before it became a member". The answer to this is that the condition was one which was to

become operative *after* the plaintiff became a member bank, and it had to do with the kind of treatment it should receive *after* it became a member bank. The plaintiff is now a member bank and is now threatened with proceedings for the enforcement of condition No. 4. Since condition No. 4 has not been and could not be imposed upon national banks which are members of the system, to deprive the plaintiff of its stock, of its privileges of rediscount, etc., as a member bank, because of Transamerica's ownership of stock in the plaintiff, would be to discriminate against it, contrary to the above quoted provisions of Section 301 of Title 12. Such potential future discrimination was one of the unauthorized and invalid contemplations of the condition when it was imposed by the defendants on the plaintiff. The invalid condition cannot be made effective as to the plaintiff bank except by depriving it of the privileges of membership in the defendant Reserve Bank by acts and omissions of the board of directors of the Reserve Bank which are discriminatory against the plaintiff and consequently expressly forbidden.

(e) Still another provision of the statute to which condition No. 4 runs counter is the provision of paragraph (2) of subsection (y) of Section 264 of Title 12 (Federal Deposit Insurance Law), reading in part as follows:

“It is not the purpose of this section to discriminate, *in any manner*, against State nonmember, and in favor of, national or member banks; but the purpose is *to provide all banks with the same opportunity to obtain and enjoy the benefits of this section.*” viz., the benefits of insurance of deposits.

Condition No. 4, however, provides for the termination of the status of the plaintiff as an insured bank for a reason unauthorized by the statute and peculiar to this particular bank. It therefore deprives this bank of the same opportunity “to obtain and enjoy the benefits” of federal deposit insurance as is given to “ALL” other banks.

We have this most anomalous position with respect to the plaintiff bank. It could not become a member bank without the Board having ascertained that the situation

was such as to entitle it to become an insured bank (Section 264, subsection (e) Paragraph 2). *So we must assume that it could have become an insured bank without having become a member bank.* In becoming merely a nonmember insured bank, *no conditions of any kind could have been imposed upon it by the Federal Deposit Insurance Corporation.* (See Sec. 264 of Title 12.) Consequently, the acquisition of 500 shares of the stock in the plaintiff bank by Transamerica would not have any effect whatsoever upon its status as a nonmember insured bank.

Nevertheless, it is now claimed that, having become a member bank under the terms of condition No. 4, it can automatically be deprived of its status as an insured bank by being deprived of its status as a member bank, thereby depriving it of the "same opportunity to obtain and enjoy the benefits" of federal deposit insurance along with "all banks". This is in direct conflict with subsection (y) of Section 264, which says that this discrimination shall not take place "*in any manner*".

A study of the statutes makes it clear that it was never intended by Congress that a bank should be deprived of its status as a member bank, or its status as an insured bank, except for plain violations of specific provisions of the statute, particularly provisions having to do with unsound and unsafe banking practices, or with the misconduct of its officers in direct violation of the law (see Sec. 264, Tit. 12, Subsec. (i)).

(4) *The history of the statute demonstrates that the Board had no authority to impose condition No. 4.*

As further showing that Section 321 was never deemed by Congress to give the Board authority to impose condition No. 4, it should be noted that both in the Banking Act of 1933 and Banking Act of 1935, provision was made whereby it was compulsory for State banks to become members of the Federal Reserve System by a stated time in order to retain their status as, or to become, insured banks*. Sub-

* The Banking Act of 1933 required all State banks to become member banks by July 1, 1936, in order to remain or become insured. Section 8, Banking Act, 1933, 12B (1)(y).

section (y) of Section 264 of Title 12 as enacted August 23, 1935 contained a similar provision which has since been repealed. It is obvious that when Congress required membership in the Reserve System to be obtained in order that the banks be continued as insured banks it did not authorize discrimination to be practised against those which might have corporate shareholders. Stock in many such state banks throughout the country were held by corporations which were capable of becoming holding company affiliates. To have excluded them from membership in the System and insurance because some corporation owned a few shares of their stock would have been unthinkable.

(5) *There are many convincing indications that the Board of Governors knew that it had no authority to attach condition No. 4 to its permit.*

(a) *The very framework of the condition and the exaction of an express agreement of compliance are admissions of lack of authority.*

The framework of the condition is quite peculiar. If a condition were one which the Board is authorized to attach to a permit, then upon the failure of such member bank to comply with the terms of the condition, the Board has authority to *compel* such member bank to retire from the system through the surrender of its stock, by proceeding under Section 327 of Title 12.

The very fact that the plaintiff bank was required to accept the condition and to agree to comply therewith is cogent evidence that neither the Board nor the defendant Reserve Bank felt that it could, relying solely on its own power, impose the condition and make it effective. It is no part of the scheme of the statute or of the regulations that the applying member bank should be required in express terms to accept valid conditions and to agree to comply therewith. Valid conditions are completely efficacious by virtue of their own strength, unsupplemented by any agreement. The statute will be searched in vain for any provision making membership in the Reserve System a subject of contract.

Further, condition No. 4, instead of being worded as a type of condition which could be compulsorily enforced under Sec. 327, is worded in terms of obtaining an undertaking on the part of the plaintiff bank that it would "withdraw". Valid conditions can be enforced by the Board by virtue of its own power alone. Now, the only provision for withdrawal by a member bank is contained in Section 328 of Title 12, entitled "Withdrawals from Membership". This is a section having to do with *voluntary* withdrawals. It reads in part as follows:

"Any state bank or trust company desiring to withdraw from membership in a Federal reserve bank may do so * * * upon the surrender and cancellation of all of its holdings of capital stock in the Federal reserve bank * * *."

It thus appears that at the very outset the Board was clear in its own mind that it had no power to impose the terms of No. 4 as a *condition*, and consequently it was seeking to accomplish its unauthorized purpose by exacting from the plaintiff a promise to exercise a privilege that would belong to plaintiff—something that the Board clearly had no right to do; also something that the board of directors of the plaintiff bank could not properly agree to in view of their constant and continuing obligation to the depositors and stockholders as well as their legal inability to bind their successors. The statute vests the option of withdrawal in the member bank and no one else.

(b) *The Board of Governors has, in effect, publicly and officially admitted that it had no authority to impose condition No. 4.*

If further proof were needed of the lack of authority on the part of the Board to limit the rights of plaintiff by the imposition of such a condition as condition No. 4, we need only refer to the official annual report of the Board of Governors for the year 1943 (dated April 29, 1944), required by law, in which the Board expressly states that it has no authority to limit the growth of bank holding

companies and no regulatory powers over them except in connection with the granting or refusing to grant a permit to the holding company, permitting it to vote its stock in a bank which it controls.

In other words, it in effect, asserted that it had no power to regulate holding companies in any way by the imposition of a condition upon an applicant state bank, such as condition No. 4.

The report reads, in part, as follows:

“RECOMMENDED LEGISLATION ON BANK HOLDING COMPANIES.

“In the Banking Act of 1933 the Congress undertook to provide for the supervision of bank holding companies. The Board, in the light of its experience, believes the present law inadequate to accomplish the purposes for which it was enacted. * * *

“*Secondly, the only limitation which the law imposes upon the control of subsidiary banks by bank holding companies is that the latter may not vote their stock in a controlled bank without securing a voting permit from the Board, and it is only as an incident to obtaining the voting permit that there is any regulation at all.*” * * *

“*There is now no effective control over the expansion of bank holding companies either in banking or in any other field in which they may choose to expand.*” * * *

“It is recognized that bank holding companies have served a useful purpose in some areas of the country and have contributed banking services which might not otherwise have been available or might not now be available * * *.

“For these reasons the Board recommends *that immediate legislation be enacted preventing further expansion of existing bank holding companies or the creation of new bank holding companies* * * *”.

The Supreme Court of the United States in a recent opinion has held that an administrative agency cannot employ administrative measures founded upon misapprehension of the legal rights of the parties in order to effect a change of policy for which legislation had been sought.

Arenas v. United States, 322 U. S. 419, 64 Sup. Ct. 1090, 88 L. Ed. 996 (1944).

The invalidity of condition No. 4 does not arise from any abuse of discretion but arises from a total lack of authority in the Board of Governors to impose such a condition.

The gist of the complaint is that condition No. 4 was imposed upon the plaintiff without any warrant in law whatsoever (Par. VIII of the complaint, R., pp. 8, 9). The excerpt which we have just quoted above (p. 31) from the annual report of the Board of Governors, admits, in effect, a total lack of any power whatsoever to regulate holding company ownership of the stock of a state member bank.

In their brief in the District Court, counsel for the Board of Governors made the following very cogent statement:

*“Plaintiff pleads that the condition No. 4 is ultra vires, null and void in all respects; that the Board had no authority in law to prescribe or exact such condition. The condition is pleaded in haec verba (IV). The Board’s power or authority to prescribe or exact this condition is or is not found in the law. It either has the power or it has not. If it has the power, no court can interfere with the exercise of it. If it does not have the power, the condition, as pleaded by plaintiff, is null and void. It is only necessary to read the condition to determine whether or not it has the power, since everyone is presumed to know the law. A mere reading of the condition gives the answer whether or not it is a valid provision. * * *.”* (Italics ours). (R., p. 122).

With this statement we are in entire agreement.

Where the validity of the condition turns upon whether there has been proper or an improper exercise of discretion, then of course “a mere reading” of the condition cannot demonstrate its validity or invalidity. In cases where discretion is involved, the imposing authority must have a day in court in which to justify its action as a proper

exercise of discretion. It must have an opportunity to come forward with the reasons which motivated the taking of the action complained of. But in this case both parties agree that condition No. 4 is either valid or invalid on its face.

The circumstance that the Board of Governors had some discretion as to the conditions they would impose, *within the limited range of their authority* with respect to the imposition of conditions, has no bearing on the question before the Court. Condition No. 4 is obviously outside of the realm of that authority and consequently outside the realm of any discretion. It was purely arbitrary and capricious, and as we have shown, p. 21 *et seq.*, *supra*, even ran counter to several express statutory provisions.

Absolutely no discretion existed in the Board either to impose or not to impose a condition such as condition No. 4.

We therefore submit that even if, as was held by the Court below, the Board of Governors were the sole actors in the imposition of condition No. 4 (notwithstanding the allegations of the complaint to the contrary) it is clear that the Board of Governors was entirely without warrant or authority in law for the imposition of such a condition.

Condition No. 4, Being Without Authority in Law, Is Absolutely Null and Void.

As was said by the Supreme Court in the case of the *Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U. S. 129 at 134, 56 Sup. Ct. 397, 80 L. Ed. 528 (1936): "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Condition No. 4 is such a nullity.

Accord *U. S. v. George*, 228 U. S. 14, 33 Sup. Ct. 412, 57 L. Ed. 712 (1913); *Waite v. Macy*, 246 U. S. 606, 38 Sup. Ct. 395, 62 L. Ed. 892 (1918); *Koshland v. Helvering*, 298 U. S. 441, 56 Sup. Ct. 767, 80 L. Ed. 1268 (1936); *Panama Refining Company v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446 (1935).

We do not have to stress this contention for the reason that the Board of Governors, in the quotation which we

have made from its brief in the Court below recognizes this rule and states it with great cogency (see quotation p. 32 *supra*).

II.

Not only is the condition invalid for complete lack of authority to impose any condition of that character and for that purpose, but it is also invalid because arbitrary, unreasonable and unjust, and because it is discriminatory.

Obviously the plaintiff bank, as a bank, has no control over the conduct of its stockholders. Under California law they are entitled to sell their stock to whomsoever they please, and whensoever they please. Accordingly, in this case, without the knowledge or participation of the plaintiff bank, stock in the bank has been sold to the Trans-america Corporation. Assuming, for the moment, the condition to be a valid condition, and assuming that it can be compulsorily enforced in some manner, the consequence of condition No. 4 is that, the plaintiff bank, as a bank, will lose the privileges of being a member bank, and, *ipso facto*, will also lose its status as an insured bank. Both of these results are extremely detrimental to the interests of all the stockholders. The innocent stockholders who were stockholders in a bank enjoying all the valuable privileges of reserve membership and the advantageous standing of an insured bank, without any fault of their own, and not because of anything having to do with the condition of the bank, find themselves stockholders in what is a second rate and practically a black-listed bank. The market value of their stock in the appellant bank would obviously immediately tumble upon receipt of a notice to withdraw given by the Board of Governors under Condition No. 4, for, among other things, California Act 652A, Section 1 provides for double liability of shareholders of a state bank except with respect to shares in a bank whose deposits are insured by the Federal Deposit Insurance Corporation pursuant to the Federal Reserve Act as amended. Obviously

also the appellant bank itself would suffer in this connection, for any unissued stock of the bank which it might desire to sell for purpose of raising capital would have a diminished market value.

These consequences are also extremely detrimental to the interests of the depositors in the bank. The depositors find themselves in a condition where they have established a banking relation with a bank whose deposits at the time are insured, but after the enforcement of condition No. 4 of which they had no knowledge, they are depositors, if they desire to continue their established friendly relations, in a bank whose subsequent deposits are not insured and whose insured deposits will soon be exhausted. And all these consequences have nothing to do with the soundness of the bank nor with the prudent and safe manner in which its banking operations are being conducted. The bank may be the very soundest and best managed bank in the United States, and nevertheless, because of the seeming hostility of the present Board of Governors of the Federal Reserve System to Transamerica and to the Bank of America, these innocent stockholders and these depositors who have no interest in that situation are to be penalized.

It might well be in the particular case that Transamerica's interest in the bank greatly strengthens it and adds to its stability and capacity to do business. The Board in its 1943 Report, which we have quoted above, stated that "bank holding companies have served a useful purpose in some areas of the country, and have contributed banking services which might not otherwise have been available or might not now be available, * * *" (Rep. p. 37). We have no doubt that that is the fact in the instant case. The Peoples Bank having the benefit of the experienced advice of the Transamerica organization, and having the benefit of the financial support and aid of Transamerica, is a much stronger bank than it could possibly be with its purely local ownership.

Any condition which the statute authorizes the Board of Governors to impose pursuant to the statute, must be a condition which the bank has the power to perform. It must be a condition with respect to the performance or non-

performance of which the bank has control. In fact all the statutory provisions governing membership refer to the applying *bank* and to things which it must do, and not to its stockholders. To subject the bank to a condition which might deprive it of its membership in the system and of its status as an insured bank for an innocent and lawful act of a stockholder over which it has no control whatsoever, could never have been contemplated by Congress. We repeat, that the condition is arbitrary, unreasonable, unjust, and, we say, vicious.

Further, every valid condition must, *in its fundamental principle*, have universal application. *It must not be discriminatory.* The Board clearly has no right to prescribe that the Peoples Bank shall be required to surrender its stock and cease to be a member in the event that a particular holding company, or any holding company, should acquire an interest therein, unless it makes the same prescription with respect to every other existing state member bank or applying state bank and as affecting every possible holding company that might acquire a stock interest in the member bank through loans or otherwise. The right to discriminate in this situation would be an intolerable tyranny.

Transamerica owns sufficient stock in several member banks, both state and national, to make it a holding company affiliate of such banks and it has minority interests in other member banks. None of them has been inflicted with a condition No. 4. Another bank holding company, by way of example, owns the controlling stock of 80 or more banks and trust companies. Of the state banks owned by that corporation, several are members of the Federal Reserve System, and we make bold to assert that no such condition as condition No. 4, in any manner, shape or form, was attached to the admission of these state banks into the Federal Reserve System. As proof of the arbitrariness of this condition, we are prepared to show that since condition No. 4 was imposed on the plaintiff bank, another California state bank has been admitted to membership without the imposition of any such condition.

This point is well sustained in *Manhattan General Equipment Company v. Commissioner*, 297 U. S. 129, 56 Sup. Ct. 397, 80 L. Ed. 528 (1936), *supra*, p. 33. The Court said, at page 134:

“And not only must a regulation, in order to be valid, be consistent with the statute, *but it must be reasonable. International Railway Company v. Davidson*, 257 U. S. 506, 514.”

Accord *International Ry. Co. v. Davidson*, 257 U. S. 506, 42 Sup. Ct. 179, 66 L. Ed. 341 (1922); *Nolan v. Morgan*, 69 F. (2d) 471 (C. C. A. 7th, 1934);

See also *Vom Baur, Federal Administrative Law*, Vol. 1, Section 500.

Nor can a regulation be discriminatory.

Bailey v. Holland, 126 F. (2d) 317, 322 (C. C. A. 4th, 1942).

III.

If the statute be construed as authorizing the Board to prescribe condition No. 4, the statute would be unconstitutional as involving a delegation of the legislative power vested in Congress alone under Section 1 of Article I of the Constitution, also in contravention of the delegation of legislative power to Congress in specific instances enumerated in Section 8 of Article I. Such exercise of power by the defendants is likewise unconstitutional as being in violation of the Fifth Amendment to the Constitution.

We do not elaborate this point, inasmuch as no contention has been made that condition No. 4 was authorized by the statute.

It is an elementary principle of statutory construction that a statute should be construed, if possible, in such a manner as to avoid any conflict with the constitution. See

Panama R. Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 748, 44 Sup. Ct. 391 (1924);

Lewellyn v. Frick, 268 U. S. 238, 69 L. Ed. 934,
45 Sup. Ct. 487 (1925);

Hassett v. Welch, 303 U. S. 303, 82 L. Ed. 858, 58
Sup. Ct. 559 (1938).

We submit that it is too clear for argument that Congress itself has no power to establish condition No. 4 by direct legislation. It can, of course, say that no bank shall be a member of the Federal Reserve System whose stock is held by a holding company, but it cannot pick out one bank and say to that bank alone that it shall not be admitted nor retained as a member if any of its stock is held by a holding company, while all other similarly situated banks may be admitted or retained. Nor can Congress by legislation expressly discriminate against any particular holding company as a holder of stock in a member bank or against a particular bank like the Bank of America, acquiring an interest through commercial loans or otherwise in a member bank, for Congress itself would have to make its legislation applicable to all institutions that were in the same situation.

A fortiori, if Congress itself could not legislate the condition, it could not delegate to an administrative board like the Board of Governors any express authority or any discretionary authority enabling it to impose such discriminatory condition. The plaintiff invokes the protection of the constitutional provisions referred to herein and specified in its complaint against any contemplated acts of the defendant bank taken pursuant to Condition No. 4.

Schechter v. United States, 295 U. S. 495, 79 L.
Ed. 1570 (1935);

Panama Refining Co. v. Ryan, 293 U. S. 388, 70
L. Ed. 446 (1935).

IV.

The Board of Governors is not an indispensable party.

This procedural point is the main defense of the Reserve Bank. The gist of the opinion of the District Court on this point follows (R., p. 161) :

“It is thus evident from the law that the Board is the only body vested by Congress with authority to admit and expel state member banks. * * * This being true, any act on the part of the Reserve Bank, looking to the imposition of conditions of membership or the enforcement thereof, would be an act on its part, without authority in law and without binding effect. * * * *As a subaltern without authority, the Reserve Bank may not be sued alone for the alleged misfeasance of the admitted superior*”.

Citing: *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 34, 17 Sup. Ct. 225, 41 L. Ed. 621 (1897); *Gnerich v. Rutter*, 265 U. S. 388, 44 Sup. Ct. 532, 68 L. Ed. 1068 (1924); *Jewel Productions Inc. v. Morgenthau*, 100 F. (2d) 390 (C. C. A. 2d, 1938); *Neher v. Harwood*, 128 F. (2d) 846, 849 (C. C. A. 9th, 1942).

It is noteworthy that the District Court does not cite or in any way refer to *Colorado v. Toll*, 268 U. S. 228, 45 Sup. Ct. 505, 69 L. Ed. 927 (1924), *infra*, p. 40 or *Berdie v. Kurtz*, 75 F. (2d) 898 (C. C. A. 9th, 1935), *infra*, p. 41.

It is clear, we submit, that the District Court misapprehended the character of this suit. It discusses the suit, in the language quoted above, as if it were a suit against the Reserve Bank for “the alleged misfeasance of the admitted superior”. Obviously, the Reserve Bank cannot be sued, either alone or in conjunction with any other defendant, for the misfeasance of the Board. The Reserve Bank can be sued only for its own wrongdoing. It is with respect to that wrongdoing, present and threatened, that this suit is brought. And it is because the Reserve Bank is a separate and independent wrongdoer, it is because the Reserve Bank has taken and proposes to take action of

its own, which is without warrant in law, that this suit can be brought against it alone *for a declaration of respective rights*—without the necessity of the presence of the Board of Governors as a party to the suit.

THE LAW.

The applicable rule of law is stated by this Court in a well considered opinion to be that where the superior “had no authority whatsoever to issue the regulations complained of”, “his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint.” (*Neher v. Harwood*, 128 F. (2d) 846, at 849 (C. C. A. 9th, 1942).

The leading case is *Colorado v. Toll*, 268 U. S. 228, 45 Sup. Ct. 505, 69 L. Ed. 927 (1924). In that case, the State of Colorado brought a suit to enjoin the superintendent of the Rocky Mountain National Park from “enforcing certain regulations for the government of the park, which are alleged to be beyond the authority conferred by Acts of Congress and to interfere with the sovereign rights of the State”. The regulation complained of was one adopted by the superior (the Secretary of the Interior) which refused permission to anyone to operate automobiles for hire in the park except one corporation which had received a permit. *There was no claim that the statute under which the regulations had been promulgated was unconstitutional.* The statute creating the Rocky Mountain National Park expressly made it the duty of the Secretary of the Interior to make reasonable rules and regulations for the management of the park, and expressly stated that such regulations should “include the provision for the use of automobiles therein” (Act of January 26, 1915, C. 19, 38 Stat. 798). The only complaint was that the particular regulation was entirely without authority. The court said (268 U. S. 228, at 230):

“The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question

that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States.”

In *Berdie v. Kurtz*, 75 F. (2d) 898 (C. C. A., 9th, 1935), cited and discussed with approval in *Neher v. Harwood*, 128 F. (2d) 846, at 850, certain milk dealers brought a suit to enjoin the enforcement of certain licenses issued by the Secretary of Agriculture. The defendants were the officer in charge of the Los Angeles Office of the Field Investigation Section under the Agricultural Adjustment Act, member of the Milk Industry Board organized under the AAA, and the United States Attorney at Los Angeles. The Secretary of Agriculture was not made a party.

No contention was made that the Act of Congress under which the Secretary of Agriculture was purporting to act was unconstitutional. The contention was that the Act of Congress had not given the Secretary of Agriculture authority to do the particular act in question, to-wit, require licenses with respect to milk moving only in intrastate commerce. It was clear that the Secretary of Agriculture did have authority to issue licenses of the kind in question if such licenses were limited to transactions involving interstate commerce. This Court said (75 F. (2d) 898, at 905):

“Appellants’ next contention is that the Secretary of Agriculture is an indispensable party to this action. * * * The actions of the appellants who were seeking to carry out the regulations of the Secretary are not authorized by the act of Congress. The appellees are not engaged in ‘interstate commerce’, and as to them the actions of the appellants constitute trespass. Under such circumstances the appellants cannot shield themselves behind the unauthorized regulations. The Secretary is not a necessary party. *State of Colorado v. Toll*, 268 U. S. 228 * * *.”

In *Neher v. Harwood*, 128 F. (2d) 846 (C. C. A. 9th, 1942), this Court reviewed at length most of the decisions having to do with the indispensability of the superior officer as a party defendant in a case brought against the inferior where it was claimed that there was no warrant or authority in law for the action involved. After discussing at

length *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621 (1897), and *Gnerich v. Rutter*, 265 U. S. 388, 44 Sup. Ct. 532, 68 L. Ed. 1068 (1924), upon which the defendants so much rely, and which the District Court cited in support of its opinion, and after discussing *Webster v. Fall*, 266 U. S. 507, 45 Sup. Ct. 148, 69 L. Ed. 411 (1925), this Court, in the *Neher* case, then considered *Colorado v. Toll*, *supra*, and said (128 F. (2d) 846 at 849):

“The plaintiff in this case, it is clearly seen, was not claiming that the superior officer had abused a discretion legally vested in him, but rather that he had no statutory authority whatsoever to issue the regulations complained of. The confusion as to this case and the *Gnerich* and *Webster* cases now clears. The Supreme Court in *Colorado v. Toll* did not overrule these two former cases, but instead properly and logically discerned the principle upon which they differed. In the two former cases the superior officer had acted under a statute which was not attacked as unconstitutional, but it was contended that the superior had in some manner abused his discretion and in such circumstance it was held that he should be made a party to the action in order to defend his direction and regulations. Where he was without authority to act at all in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint.”

The cases involving a question as to the indispensability of the superior as a party defendant have been collected and analyzed recently in the case of *Hartmann v. Federal Reserve Bank of Philadelphia*, 55 F. Supp. 801, (D. C., E. D. Pa., April, 1944).

See also:

Waite v. Macy, 246 U. S. 606, 38 Sup. Ct. 395, 62 L. Ed. 892 (1918).

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90 (1902);

Morrill v. Jones, 106 U. S. 466 (1882);

Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 151 (1920);

In all of these cases, as in the instant case, the following conditions existed:

1. There was an Act of Congress validly giving authority to the superior officer, *within certain limits*, to establish regulations, require licenses or impose conditions. Within the prescribed limits, the superior officer had discretion.

2. There was no authority given to the inferior by law or by regulation, to establish regulations, require licenses or impose conditions. The inferior in all the cases was, at best, "a subaltern without authority".

3. The superior officer had established a regulation, required a license or imposed a condition which was without any warrant in law. The superior officer had exceeded the authority given to him.

4. There was no authority in the statute given to the inferior (the subaltern) to take any action to enforce the regulation, or the license requirement or the condition in question.

5. The inferior had taken or was threatening to take action adversely affecting the plaintiff, basing his right to do so on the invalid regulation, license requirement or condition established initially by the superior.

In holding that "as a subaltern without authority, the Reserve Bank may not be sued alone for the alleged misfeasance of the admitted superior" (R., pp. 161, 162), the District Court in the instant case was, as above pointed out, deciding something as to which there is no controversy, and, at the same time, the Court was not dealing with the actual controversy and deciding it in accordance with the authorities. Its final determination was, we submit, erroneous.

Since this proceeding is based on the contention that neither the superior nor the subaltern had any warrant in law for the action complained of, they were both wrong-

doers; and each can be sued separately *with respect to its own acts*. In the language of this Court in the *Berdie* case, *supra*, their actions “constitute trespass”.

The instant case is even stronger than any of these cases, because *the Federal Reserve Banks are not mere subordinates* of the Board. The Federal Reserve Banks are not the creatures of the Board of Governors. They are the independent corporations and creatures of the statute. Nor are the Reserve Banks the agents of the Board. True it is that in certain respects the Board of Governors has supervision over and in some cases can give direction as to certain of the activities of the Federal Reserve Banks. But, by and large, the Federal Reserve Banks, as independent corporations, conduct their affairs, in fact and as authorized by statute, pursuant to the action of their own Board of Directors and their own staff of officers. Section 301 of Title 12 provides that “Every Federal Reserve Bank shall be conducted under the supervision and control of a Board of Directors. The Board of Directors shall perform the duties usually appertaining to the office of directors of banking associations, and all such duties as are prescribed by the law”. The Reserve Banks, their Boards of Directors, and their officers are not the agents, employees or subordinates of the Board.

Not only is there no actual relationship of superior and subordinate as between the Board of Governors and the defendant Reserve Bank, with respect to the conduct of the Reserve Bank in imposing the condition No. 4 upon the plaintiff, but the *Reserve Bank has no corporate power to act as the agent or subordinate of the Board in the situation*. The Reserve Banks are given power only to exercise the powers “specifically granted” by the provisions of Chapter 3 of Title 12, and “such incidental powers as shall be necessary to carry on the business of banking within the limits prescribed” by the chapter. The power to act as a subordinate to the Board with respect to the imposition of conditions on the acquisition of its stock, or to act as such subordinate in the enforcement of a condition is not one of these powers.

In the matter of the acquisition of stock in a Reserve Bank by a state bank, the Board of Governors has the function under the statute of granting the permit. But once the permit is granted, it is *functus* on that aspect of the question. Thereafter, the applicant state bank, armed with the permit, goes to the Reserve Bank, as it would to any other corporation, and upon its paying the requisite subscription price for his stock, is entitled to have its stock. Stock is issued to the applicant by the Reserve Bank as an independent functionary, not as a mere agent or conduit or employee or subordinate of the Board.

Nor is the Reserve Bank the agent or subordinate of the Board, in respect to any attempted enforcement of a condition. As we point out more at length hereafter (*infra*, p. 49), an order of the Board under Sections 327 and 328 of Title 12, designed to enforce a valid condition, is directed toward the offending member bank and requires action on its part, and is not in the nature of an order to or authorization to the Federal Reserve Bank.

The consequence is that both with respect to the imposition of conditions and also any action taken to make the same effective, the Reserve Bank has no standing at law to act as the subaltern or agent of the Board. Whatever it does, it does as an independent agency or as a volunteer. Since, as a mere subaltern, it can be required to stand suit alone for its own "trespass", *a fortiori*, it can be sued alone for what it does in an independent status or as a mere volunteer.

Further, the Federal Reserve Agent is the only person having any power to act as the agent or representative of the Board in any capacity within the twelfth Federal Reserve District. The statute is mandatory in this respect. It says (Section 305): "He" (the Federal Reserve Agent) "shall act as its" (the Board's) "official representative for the performance of the functions conferred upon it by this chapter."

One question, and one question only, has to be examined in connection with this matter of indispensable parties, to-wit: did the Board of Governors act without warrant or

authority in law in laying down condition No. 4? In other words, is condition No. 4 absolutely invalid? We have already shown the invalidity.

A final word on the question of the “indispensable” party. Congress has expressly endowed the defendant bank *with full capacity to sue and to be sued*. It has not expressly so endowed the Board. The clear implication from this is that *all* legal relationships with the bank will be subject to proper legal protection. Congress, itself, has answered the indispensable party argument.

Complete relief can be given the appellant in this proceeding. If the defendant Reserve Bank is held to have no right to take any action which is predicated, even remotely, on the validity of Condition No. 4, the plaintiff will continue to be a member of the reserve system.

V.

There is a “justiciable controversy” within the meaning of the Declaratory Judgment Statute (Section 400 of Title 28) between the plaintiff and the Reserve Bank. The Defendant Reserve Bank has many important steps to take in any attempted effective enforcement of condition No. 4 and it intends to take those steps.

As one of its reasons why it thought that “the complaint fails to state a claim or cause of action”, the District Court in its opinion stated that “as between plaintiff and the Reserve Bank, no justiciable controversy, in the legal sense, exists.” (R., p. 160.) While the District Court elaborated its views on the other points on which it based its decision against the plaintiff, it did not in any way elaborate upon the statement just quoted.

(a) *The complaint clearly states a justiciable controversy* (Par. VIII thereof, p. 4, *supra*). It states that the defendants contend that condition No. 4 is in all respects valid and enforceable and empowers the defendants to deprive the plaintiff of its stock in the defendant Reserve

Bank and that the defendants intend to take proceedings “predicated on said condition No. 4” designed to deprive plaintiff of its ownership of said shares and that such “proceedings are imminent”. In answer to this, the defendant Reserve Bank argued on the motion to dismiss: (1) that it had no lawful power to impose conditions—power in this respect being lodged only in the Board of Governors under Section 321 of Title 12; (2) that it had no power in law with respect to the enforcement of conditions—power in this respect being lodged only in the Board of Governors under Section 327 of Title 12; (3) that it did not in fact have anything to do with the imposition of condition No. 4; and (4) that it does not in fact intend to have anything to do with the enforcement thereof. Obviously contentions 3 and 4 are not open to the defendant Reserve Bank on its motion to dismiss, which for the purposes of the motion admits the allegations of the complaint. With respect to contentions 1 and 2, *lack of lawful power*—the whole basis of the plaintiff’s suit is that there is no lawful power in anybody, whether it be the Board of Governors or the Reserve Bank or anyone else, either to impose condition No. 4 in the first place, or to enforce it in the second place. On the premise that we are dealing with an invalid condition (which for the purpose of these motions is not questioned by defendants, R. p. 125), the only question which the Court has to consider is whether or not the defendant is *an actor* who is himself taking steps or about to take steps against the plaintiff that have no warrant in law. The complaint alleges that the defendant Reserve Bank is such an actor,—that it is about to take proceedings predicated upon condition No. 4 designed to deprive plaintiff of its stock in that bank. On the motion to dismiss, this clearly states a case against the defendant Reserve Bank for a declaratory judgment.

(b) Entirely aside from the admitted allegations of the complaint, a *justiciable controversy exists in fact*. It is demonstrable that the defendant Reserve Bank would have many steps to take purely on its own, in any attempted effective enforcement of condition No. 4, and that when the

appropriate time comes to take action, it intends to take those steps.

On the subject of authority in law to enforce condition No. 4, the District Court said, among other things:

“* * * *any act on the part of the Reserve Bank, looking to the imposition of conditions of membership or the enforcement thereof, would be an act on its part without authority in law and without binding effect*” (R., p. 161).

We agree with this statement, but what the District Court did not consider was the fact that, as alleged in the complaint, the defendant, nevertheless, threatens to take imminent action in the enforcement of the invalid Condition No. 4. That is the very basis of our suit. The lack of authority in the defendant to validly enforce the condition is not a reason why plaintiff should be dismissed, but a reason why plaintiff should prevail.

If, as in this case, the condition sought to be enforced is without warrant in law and a nullity, then obviously any act by any person whatsoever, either the Board or the Reserve Bank, in the attempted enforcement thereof, or in the execution of any order designed for the enforcement thereof, is likewise without warrant in law. In such a case, no order from the Board affords any authority to the Reserve Bank, and any act which the Reserve Bank performs in the attempted execution of or supplementing such an order is the act of a wrongdoer.

We respectfully submit that the District Court did not take into account that as against a State member bank rightfully resisting the attempted enforcement of an invalid condition, the order of enforcement of the Board would be invalid, and consequently any act of the Reserve Bank in the attempted effectuation thereof would be without authority and would constitute a trespass.

Section 327 of Title 12 is pointed to by the defendants as being the only source of authority in anybody to enforce valid conditions. This section and the following section, Section 328, read in part as follows:

Section 327—"If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank *has failed to comply with the provisions of sections 321-338, inclusive, of this title, * * ** it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership."

Section 328—"Whenever a member bank shall surrender its stock holdings in a Federal reserve bank, or shall be ordered to do so by the Board of Governors of the Federal Reserve System, *under authority of law*, all of its rights and privileges as a member bank shall thereupon cease and determine * * *."

Sections 327 and 328 contemplate a valid order by the Board based on a valid condition. The only order the Board can make pursuant to these sections is an order *to the offending bank* to "surrender its stock". It is not authorized by law to make any order of any kind directed *toward the particular Reserve Bank* in which the offending member bank has stock. There is no authority given by the Act, or to be given by the order of the Board to any Reserve Bank to do anything if the offending member bank does not, in obedience to the Board's order, "*surrender*" its stock.

But action under Sections 327 and 328 is predicated upon a valid order based upon a valid condition. In the instant case, we have to do with an invalid condition on which no valid order of any kind can be based. *It is to be assumed, therefore, that if the Board of Governors should make an order in the very language of Section 328, ordering the plaintiff bank to surrender its stock holdings in the defendant Reserve Bank, the plaintiff bank would refuse to comply with this order.* The plaintiff bank would say that the order of surrender had not been made as the statute required it to be made, to-wit, "*under authority of law*".

A very important question in this case is—what would the defendant Reserve Bank then do under those circumstances? If the Reserve Bank has nothing to do in those circumstances and does not intend to do anything

whatsoever in those circumstances, if at that juncture, it has no interest in the situation whatsoever, then, of course, the plaintiff states no cause of action against the defendant Reserve Bank, to have title to its stock quieted against the admittedly void and inoperative condition (see Point VII, *infra*). There would be *aside from Cal. Code Sec. 738* “no justiciable controversy, in a legal sense” between the plaintiff and the Reserve Bank.

But, at that juncture, the Reserve Bank either would continue to recognize the plaintiff bank as a stockholder or it would refuse to do so. Which would it do?

Can there be any question? It is clear, we submit, beyond peradventure of doubt, that not only would the Reserve Bank have many important steps to take at that juncture to make the condition effective but, also, that it clearly intends to take these steps. The bill of complaint alleges that it intends to take these steps (Par. V);—that it intends to do whatever it can to enforce the condition (Par. VIII, R., p. 8). The motion to dismiss admits the allegation.

The following things are, we believe, plain:

1. That the defendant Reserve Bank would recognize as valid and would cooperate in carrying out any order made by the Board of Governors in the attempted enforcement of condition No. 4. It would seek to terminate plaintiff's relation to it as a stockholder. So much was, in substance, asserted by counsel for the Board of Governors and for the Reserve Bank in the District Court (R., pp. 113, 125).

2. The defendant Reserve Bank would then proceed to cancel the shares of the plaintiff bank on the records of the Reserve Bank—notwithstanding that plaintiff refused to “*surrender*” its certificates. *So much was admitted by counsel for the Reserve Bank in argument in the District Court* (R., p. 114).

3. The Reserve Bank would also refuse to permit the plaintiff bank to exercise its right as a stockholder given to it by the statute (Sec. 304 of Title 12) to vote for directors of the Reserve Bank.

4. The Reserve Bank would also refuse to pay to the plaintiff bank dividends at the rate of 6% per annum upon the stock now held by the plaintiff bank in the Reserve Bank, which dividends are mandatory under the statute (Sec. 289 of Title 12).

5. The Reserve Bank would also seek to return to the plaintiff its cash subscription to the stock of the Reserve Bank (Sec. 328 of Title 12).

6. The Reserve Bank would also refuse to grant to the plaintiff the privileges of rediscount and other very valuable privileges to which the plaintiff, being a stockholder in the Reserve Bank, is entitled as a member of the Federal Reserve System.

Against a member bank which would insist upon its rights and refuse to surrender its stock pursuant to an order of the Board requiring it to do so, the Reserve Bank would, *beyond question and in every case*, whether the order of the Board was valid or not, take the steps catalogued above. If the order of the Board was a valid order based on a valid condition, the Reserve Bank would be justified in so acting. But if, as in this case, the order of the Board was an invalid order based on an invalid condition, then the Reserve Bank would not be justified. It would then be a wrongdoer.

The mere order of the Board of Governors directing the plaintiff bank to surrender its stock in the defendant Reserve Bank would be an idle gesture, unless and until supplemented by the action of the Reserve Bank in doing the only effective things that can be done to make the order effective. No matter what order the Board may make, seeking to require a surrender by the plaintiff of its stock, the final action, *the only action, that will give effect to the Board's order against a non-complying plaintiff, will be action by the defendant Reserve Bank*. It will be the Reserve Bank that will do the things we have catalogued above.

We have no doubt that, predicated its action upon an order issued by the Board purporting to act under Sec. 327,

and thereby in substance predicated its action on condition No. 4, the defendant Reserve Bank, in fact, would take steps designed to deprive the plaintiff of its ownership of its shares and of all the benefits thereof (see allegations in Paragraph VIII of Complaint). The complaint so alleges; the motion to dismiss admits the allegations.

The conduct of the defendant and the admissions of its counsel admit of no other interpretation.

As the Supreme Court said, per Justice Holmes, in *Waite v. Macy*, 246 U. S. 606, 38 Sup. Ct. 395, 62 L. Ed. 892 (1918) at 609:

“But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions of their counsel were enough to make their intent to do so plain.”

On this important question as to what the defendant Reserve Bank would actually do in the execution of any attempted enforcement of condition No. 4, the Reserve Bank has been quite unrealistic and quite evasive. In our main brief in the District Court we pointed out the steps which the Reserve Bank itself would necessarily have to take in the attempted effective enforcement of condition No. 4, as against a plaintiff who refuses to recognize the validity of any proceeding based on condition No. 4 (R., pp. 118, 119). They are the various steps just catalogued at page 50, *supra*. In its reply brief the Reserve Bank very carefully avoided any discussion whatsoever of our contentions in this respect.

When it came to oral argument, counsel for the Reserve Bank admitted that the Reserve Bank might have to do one thing at least, and that is, *cancel the stock on the books of the defendant Reserve Bank* (R., p. 114), although the

certificates had not been surrendered. He attempted to belittle that act by describing it as a "ministerial act" (R., p. 113). [How can an act that is designed to deprive plaintiff of his stock without a surrender of the certificates be regarded as a ministerial act?] In view of the importance of the particular question as to what the Reserve Bank would have to do to make any order of enforcement effective, counsel for the plaintiff at this point in the oral argument in the District Court interrupted counsel for the Reserve Bank and requested him to inform the Court as to what he had to say about the other acts which the plaintiff's counsel had contended in its main brief, as we herein contend, that the Reserve Bank would have to perform (R., p. 114). Did counsel for the Reserve Bank take the occasion to enlighten the Court and counsel on this subject matter? He did not. He refused to be interrupted (R., p. 114). And although again challenged in the argument to state what the Reserve Bank would do with respect to these matters (R., pp. 120 and 144), he again avoided a discussion of the matter when it came to his reply argument.

But counsel for the Board of Governors was not quite so evasive. There was no doubt in the mind of counsel for the Board that the Reserve Bank would have many acts to perform in the attempted effective enforcement of condition No. 4. And, consequently, counsel for the Board confronted the District Court with a dilemma. "What," he said in substance, "would the poor Reserve Bank do in the event that the District Court declared condition No. 4 invalid, and the Board nevertheless made an order seeking to enforce it?" (R., pp. 125, 126). He said, in fact: "Now, the officers of the Federal Reserve Bank of San Francisco would certainly be in a dilemma. They would be afraid not to go ahead and not recognize the plaintiff bank as a member because they would be presently subject to a contempt action by this Court. On the other hand under the law of this matter, they would be violating the direction and order of their superior in Washington if they continue to recognize them (plaintiff bank) as a member". (R., p. 126.) But how could any such dilemma exist if, as contended by the

Reserve Bank, no action on its part will be required to make effective an order of the Board under condition No. 4. The Board, at least, clearly recognizes that the only effective thing, to wit, the future non-recognition of the plaintiff as a member bank would be action of the local Reserve Bank.

And what was the action which counsel for the Board of Governors proposed as the action which might be taken by the Board to solve this dilemma? He proposed a most astounding solution—to wit, that the Board of Governors in the exercise of a power which it has under certain conditions (see subsection (f) of Section 248 of Title 12) might remove any officers of the Reserve Bank who would continue to recognize the plaintiff bank as a member (R., p. 126). This very proposed solution is a clear recognition by counsel for the Board that it is action of the Reserve Bank and action by it alone that would be necessary in order to make effective the enforcement of condition No. 4 by depriving the plaintiff of its privileges as a member bank.

But, clearly, subsection (f) of Section 248 of Title 12, which gives the Board the power to suspend or remove officers of a Federal Reserve Bank for “cause” could not be invoked by the Board to remove an officer who had continued to recognize the plaintiff bank as a member bank pursuant to a declaration of the Court in this suit to the effect that condition No. 4 was invalid, and consequently afforded no basis for a termination of plaintiff’s membership in the Reserve System.

That the Board would contemplate nullifying the decree of this Court in such a manner is obviously an astounding proposal, even if the Board of Governors could treat the obedience by an officer of the bank to the declaration of this Court as good “cause” for his removal. Doubtless, in *Colorado v. Toll*, the Secretary of the Interior could have removed the Superintendent of the Parks who gave heed to the action of the Court in that case, taken in the absence of the Secretary of the Interior as a party to the suit. But, as above stated, this all makes it clear that the Board itself believes it to be necessary for the Reserve Bank to take

action in order to make any order of the Board effective against the plaintiff bank.

We Challenge the Defendant Reserve Bank Either Specifically to Admit or Categorically and Specifically to Deny What We Herein Claim It Would Do.

An excellent test of the action which the defendant Reserve Bank must in any event take to make condition No. 4 effective is given by the following illustration. Suppose that the Board proceeded to endeavor to enforce condition No. 4 by proceedings under Section 327, and that the plaintiff bank paid no attention to these proceedings, and that following the same, the Reserve Bank purported to cancel the plaintiff's stock in that bank. Suppose then, that the plaintiff bank, relying on the invalidity of the condition, refused to recognize any validity in the proceedings for the cancellation of its stock and sued the Reserve Bank for the dividends that are payable on its stock, pursuant to statute (Section 289 of Title 12). It is clear that in view of the invalidity of the condition, the Reserve Bank would have no defense.

In conclusion, therefore, on this point, a justiciable controversy exists as between the plaintiff and the defendant Reserve Bank within the purview of Section 400 of Title 28, U. S. C. A. The defendant Reserve Bank claims the right, if and when the Board of Governors makes an order purportedly acting under Sections 327 and 328 of Title 12, requiring the plaintiff to surrender its stock in the Reserve Bank, to take the steps catalogued above and it undoubtedly would take those steps. On the contrary, the plaintiff asserts that the Reserve Bank has no such right.

VI.

The suit, as a suit for declaratory judgment, is timely.

The complaint alleges and the motion to dismiss admits that the defendants intend to take proceedings predicated on condition No. 4, designed to deprive the plaintiff of its ownership of shares in the defendant Reserve Bank, and

that such proceedings are "imminent". The Court's assumption that the lapse of time since the suit was brought, with no proceedings having been taken, shows lack of imminence is not warranted. It ignores both the allegation in the complaint and the practical realities in conducting a litigation of this importance. Obviously, *as a mere matter of comity and prudent conduct*, confronted with this suit which is a challenge to their power, none of the defendants would proceed to seek to enforce condition No. 4 until the suit is disposed of.

That the suit was at least not "technically premature" was admitted by counsel for the Reserve Bank on oral argument in the District Court (R., p. 111).

Even if proceedings are not imminent, the law does not require the plaintiff to continue under the threat of this invalid condition, with its detriment to the plaintiff's business, while the Board of Governors and the Reserve Bank make up their minds whether or not they will endeavor to enforce the condition. That they intend to endeavor to enforce it is to be assumed from the fact of its imposition and from their conduct with respect to this lawsuit.

A declaration of its rights at the present time is of the utmost practical importance to the plaintiff bank. Unless the bank can bring this proceeding now, it must live indefinitely under the constant threat of this invalid condition. It is entitled to relief from an existing intolerable situation. It is hampered right now in every direction in the conduct of its business. Its goodwill is affected. The menace of this situation is causing present damage, which, as in so many cases with which equity deals, is not susceptible of concrete proof. A financial institution must be at all times in a position to keep public confidence, which it cannot do if it is under jeopardy of adverse official action.

Among other things, how can the plaintiff find satisfactory answers to such questions as the following:

Can it conscientiously advertise its membership in the Reserve System without indicating its probationary character?

Can it continue to advertise that it is an insured bank (as it is required by law to do) without indicating that it may lose this status at practically any moment?

Can it seek new deposits, without warning the depositor of the circumstance that due to Transamerica's acquisition of 500 shares, it may lose its insurance?

Must it, in good faith, warn its present depositors of the situation?

California Act 652, Section 38 provides that "Any director, officer, agent or employee of any bank who * * * knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition containing any information which is false shall be guilty of a felony".

In seeking to attract new capital to meet the demands of its fast growing business, what kind of a statement could be made that would not defeat its purposes? It would clearly have to inform prospective investors that its membership in the reserve system and its status as an insured bank are held at the mere sufferance of the Board of Governors and the Reserve Bank who claim the right to terminate both at will and that there is nothing that the plaintiff bank can do to cure the situation.

Can it attract and retain in its service men of the highest ability while holding only a conditional membership in the Federal Reserve System?

These and many other similar questions indicate most emphatically that the *present problem* of dealing with this condition means much more to this plaintiff than to those who may regard it as an innocent experiment in paternalism.

Of course it does not appear on the face of the complaint, but, at the trial, we are prepared to prove that the present status of this condition—since the acquisition by Transamerica of its 500 shares—has occasioned a great deal of comment among interested people, in which serious question has been raised as to the status of the bank, to its detriment.

The plaintiff bank has absolutely no control over the situation. It has no means of stopping the enforcement of

the condition. It cannot rid itself of Transamerica's stock interest.

It has conformed in every respect with the requirements of the Federal Deposit Insurance Law, and yet it may lose its insurance.

It has conformed in every respect with the requirements of the Federal Reserve Act, and yet it may lose its valuable membership in the Reserve System.

One of its stockholders has, without the knowledge or consent of the plaintiff bank, done what he had a perfect right to do—he has sold his stock to Transamerica, and yet the investment of every other stockholder in the bank is seriously jeopardized.

These are not remote and academic possibilities. They are problems of which the management of the bank needs an immediate solution, and which in all justice they should have.

That the enforcement of the condition would cause irreparable damage to the plaintiff is not open to question. To lose its position as a member bank and consequently automatically to lose its position as an insured bank would do it the greatest harm. As was stated in the brief of the Reserve Bank in the District Court:

“such membership carries with it certain prestige and many practical advantages”. Citing *Hiatt v. U. S.* (C. C. A. 7th), 4 F. (2d) 374.

The very reasons given in support of the contention that suit is premature but in reality emphasize the wisdom of utilizing in this case the statutory remedy of declaratory judgment. The remedy is preventive.

On this point of timeliness, the District Court says:

“* * * this suit does not present a proper case for injunctive relief, because in the complaint no coercion or compulsion in the legal sense is alleged, because it does not appear from the complaint that plaintiff is now confronted with any immediate or imminent danger of injury, irreparable or otherwise * * *”. (R., p. 160).

“The condition of membership complained of is certainly not self-executing * * *. But it is not

alleged that the Board has taken any action of the kind described and, since over six months elapsed between the filing of the complaint in this suit and the hearing on the motions without a supplemental complaint being filed, it may be presumed that the Board has not yet acted. However that may be, it is clear that the complaint presents a case of anticipated, *possible injury, based, it seems largely, upon conjecture and not such a case of immediate and impending danger as would warrant injunctive relief.*" (R., p. 163).

The District Court fell into error, we submit, in treating this action as if it were a suit for an injunction and nothing more (Opinion R., p. 149).

This is not primarily a suit for injunctive relief. It is primarily a suit for a declaratory judgment.

Entirely different rules of law apply to a suit in which the primary relief sought is an injunction than apply to a proceeding in which the primary relief sought is a declaratory judgment. The District Court failed entirely, we submit, to recognize this difference. Some of the essential differences are as follows:

1. *In a suit for a declaratory judgment, it is not essential for the plaintiff to allege, and consequently not essential for him to prove that he is threatened with irreparable injury.*

In *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730 (1932), the plaintiff sought a declaratory judgment as to the validity of a Tennessee excise tax. The Court said (288 U. S. 249, at 262):

"Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or *alleging that irreparable injury will result from the collection of the tax.*"

The Court held that it properly had jurisdiction of the suit as a suit for declaratory judgment.

Consequently the case of *National War Labor Board v. Montgomery Ward & Co. Inc.*, 144 F. 2d 528, (C. A., D. C., 1944) upon which the District Court relied in this connection, is not in point. That was a straight-out action for an injunction, and, in such a case it might well be held that where the primary object of the proceeding is to get a permanent injunction, the complaint should state facts from which the Court, on a motion to dismiss, can determine that there is a possibility, at least, of imminent action and of irreparable damage.

2. *In a suit for a declaration of rights it is not necessary for the plaintiff to allege and consequently it is not necessary for him to prove that the plaintiff is threatened with any immediate and impending danger from any proposed action by the defendant as to which there is a controversy.*

Transamerica has acquired stock in the plaintiff bank. Condition No. 4 has become operative. The Board of Governors is in position to give notice to the plaintiff bank at any time. Naturally, as a matter of courtesy to the Court, they would not give notice during the pendency of this proceeding which involves the power to give the notice, so nothing is to be inferred from the fact that the notice has not been given to date. It is to be presumed that the condition was not imposed as an idle gesture, and that in due course the Board of Governors will give the requisite notice. At the trial we are in a position to prove the purpose for which the condition was imposed. It was expressly stated by the Board at the time of imposition and as so stated the purpose cannot be accomplished without enforcement. The vigor with which this proceeding is being fought by the defendants is consistent only with a purpose to utilize this vicious condition to the limit. *Waite v. Macy*, 246 U. S. 606, 609 (1918).

Of course, once the notice is given, everything else is automatic, so far as the Board is concerned. Under the condition, the plaintiff will be required to withdraw. If it does not voluntarily do so, the Board will undoubtedly

attempt to proceed under the provisions of Sections 327 and 328 of Title 12. Counsel for the Board practically said as much in the District Court (R., p. 125). The hearing provided for by Section 327 will be a perfunctory hearing; there will be nothing to be heard or considered. No question of fact will be involved. An order of the Board directing the plaintiff to surrender its stock is a foregone conclusion.

We have indicated (p. 56, *supra*) the present damage which this menacing situation creates with respect to the affairs of this bank. Nevertheless, it is the contention of the defendants and it is the holding of the District Court that under these circumstances, plaintiff is remediless. The District Court holds that the plaintiff must sit around with the sword of Damocles hanging over its head, awaiting the pleasure of the Board as to when it will cut the string and let the sword fall.

In so holding, the District Court entirely disregarded the established law with respect to declaratory judgments. The established rule is that where the plaintiff is confronted with a claim by a governmental agency that he is subject to the penalties of a statute or a regulation or a condition, which claim he denies, the plaintiff does not have to await the actual commencement of enforcement by that agency of its claimed authority, but can obtain relief from the threat through a declaration of rights, whenever the matter is of practical importance to the plaintiff. Such a declaration of rights is particularly the function of the court under the Declaratory Judgments Statute in cases where the plaintiff desires a declaration of non-liability under a governmental statute, regulation or condition. As was said by Judge Yankwich in his well-considered opinion in *Redlands' Foothills Groves v. Jacobs*, 30 F. Supp. 995, 1008 (D. C., S. D. Cal. 1940):

“I can conceive of no good reason for not relieving a citizen of a threat of official action resulting from his relation to a governmental agency.

“A declaration of non-liability as applied to such a relationship is, if at all, more important in these days of expansion of governmental frontiers, than a similar declaration as to contractual relations.”

Borchard, in his outstanding work on "Declaratory Judgments", has stated as follows:

"Claim of Defendant's No-Right. On the other hand, the existence or validity of the plaintiff's privileges may be brought to determination in the form of a demand for a negative declaration that the defendant has no right to do some particular act, diminishing or endangering the rights of the plaintiff. * * * Thus he may claim that the defendant has no right to demand money or salary, to reduce the plaintiff's salary, to discharge the plaintiff from employment, *to interfere with the plaintiff in the enjoyment of a franchise*, to exclude the plaintiff from drilling on defendant's land, to rescind a contract of sale, to repeal an appropriation, or to take other action violative of the plaintiff's rights under a contract. *In many of these cases injunction will not lie*, yet it is extremely important that the disputed claim be settled and *the plaintiff's rights quieted*. In some of these contested claims, the plaintiff demands stabilization or protection for rights endangered by the defendant's claim, rather than escape from any pending or potential liability to which he considers himself exposed" (Borchard, *Declaratory Judgments*, 2nd Ed., pp. 940-1).

The remedy of declaration is regarded as especially appropriate in cases where the person affected by particular governmental requirements claims the right to proceed free from such requirements. (Borchard, *Declaratory Judgments*, 2nd Ed., p. 969):

"Freedom from any governmental requirement, which is believed unlawfully to impair the privileges of the individual may likewise be judicially asked in the form of a suit for a declaration of immunity."

See also, Borchard, *Declaratory Judgments*, 1939, 9 Brooklyn Law Review, 1, 24.

In *Redlands' Foothills Groves v. Jacobs*, 30 F. Supp. 995, *supra*, p. 61, the District Court held, among other things, that a declaratory judgment as to rights might be obtained by a plaintiff who was under the cloud of some gov-

ernmental regulation, although no such immediate and impending danger as to justify an injunction existed. The opinion in this case contains an excellent discussion of the applicable law.

In *Scott v. Alabama State Bridge Corporation*, 233 Ala. 12, 17, 169 So. 273, 277 (1936), the Court said:

“Controversies touching the legality of the acts of public officials, or public agencies, challenged by parties whose interests are adversely affected, are one of the favored fields for such declaratory judgment, styled in the act and in the authorities, the ‘declaration.’ Official action, done or threatened, challenged as unlawful, a usurpation of official power, whether lack of authority appears in the terms of the statutes, or because of unconstitutionality thereof, are said to be determinable in this manner rather than force the parties to seek injunctive relief, which involves many questions going to the propriety of such relief.”

Altwater v. Freeman, 319 U. S. 359, 63 Sup. Ct. 1115, 87 L. Ed. 1450 (1943), illustrates the propriety of the use of a declaratory judgment as a means of affording security to a plaintiff although he is not under any immediate danger of loss in the situation. In that case the defendant in a suit for the specific performance of a patent license agreement set up a counterclaim asking for a declaratory judgment, to the effect that the license agreement did not cover reissued patents and that the reissued patents were not valid. Pending the litigation, royalties were being paid under protest. Plaintiff claimed there was no justiciable controversy. The court said (319 U. S. 359, at 365):

“Unless the injunction decree were modified, the only other course was to defy it, and to risk not only actual but treble damages in infringement suits * * *. It was the function of the Declaratory Judgments Act to afford relief against such peril and insecurity”. Citing, among other authorities, *Borchard on Declaratory Judgments, Second Edition*.

If the situation is one in which an *injunction* would be granted against a danger threatened in the future, *a fortiori*,

a declaratory judgment could be obtained. The case of *Columbia Broadcasting System v. United States*, 316 U. S. 407, 62 Sup. Ct. 1194, 86 L. Ed. 1563 (1942) is in point, and has many resemblances to the instant situation. That was a suit for an injunction. It was there held that the invalid regulations promulgated by the Federal Communications Commission might be made the subject of attack in the courts, although there existed no immediate threat of the application of the regulation to the business of the plaintiff. The Court said (316 U. S. 407, at 417):

“The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for noncompliance.”

So, in the instant case, the invalid condition penalizes the transfer of stock in the plaintiff bank and subjects the plaintiff bank to the gravest dangers, which, because of the present acquisition of stock by Transamerica, are right at hand. The plaintiff has the right to be free from these penalties, even if it is not certain whether the Board of Governors will, now, or three months from now, or a year from now, institute proceedings under the condition to enforce a penalty by depriving the plaintiff of its membership in the Federal Reserve System.

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808 (1902) is apposite. The case arose on a demurrer to a bill brought by the Water Company to enjoin the City of Vicksburg from proceeding with a plan to build a municipal plant, the building of which plant had been authorized by the State Legislature, it being contended that the contemplated action of the City was in violation of the Water Company's franchise. The Court held that the action which the City had taken to the date of the suit did not present a present case of a breach of the

contract with the plaintiff “but discloses an intention and attempt, *by subsequent legislation of the City*, to deprive the complainant of its rights under an existing contract”. With respect to this aspect of the case the Court said (185 U. S. 65, at 82):

“It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant’s rights under the contract, that *mere apprehension that illegal action may be taken* by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.”

This language is very pertinent to the present suit, particularly, inasmuch as this is a suit not for an injunction but for a declaratory judgment, a type of suit in which a Court customarily proceeds to disclose to the defendant that he is proceeding without warrant of law, although the plaintiff is not threatened with immediate irreparable injury.

In *United States v. Appalachian Power Co.*, 311 U. S. 377, 61 Sup. Ct. 291, 85 L. Ed. 243 (1940), the case arose on a dismissal of a bill brought by the United States against the Power Company to enjoin the construction of a dam in the New River. The Federal Power Commission had required the Power Company to take a standard form of license authorizing it to build the dam as an obstruction to a navigable stream, which license the Power Company had refused to take for the reason, in part, that it objected to Section 14 of the license, which provided for the acquisition of the dam at the end of fifty years. On this contention the court said (311 U. S. 377, at 421):

“The petitioner suggests that consideration of the validity of §14, the acquisition clause, and the license conditions based upon its language are properly to be deferred until the United States undertakes to claim the right to purchase the project on the license terms fifty years after its issuance. Assuming that the mere acceptance of a license would not later bar the objection of unconstitutional conditions, even when accompanied by a specific agreement to abide by the statute and license, we conclude that here the requirements of §14 so vitally affect the establishment and financing of respondent’s project as to require a determination of their validity before finally adjudging the issue of injunction.”

In *Euclid v. Ambler Co.*, 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303 (1926), the case arose on a motion to dismiss a bill brought to enjoin the enforcement of a zoning ordinance, on the ground, among others, that “because complainant (appellee) had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature.” On this point the court said (272 U. S. 365, 386):

“The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee’s lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee’s property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See *Terrace v. Thompson*, 263 U. S. 197, 215; *Pierce v. Society of Sisters*, 268 U. S. 510, 535.”

The court again (272 U. S. 395) referred to the case as a case in which “the equitable remedy of injunction is sought * * * not upon the ground of a present infringement or denial of a specific right or of a particular injury in process of actual execution but on the broad ground” of “the mere existence and threatened enforcement of the ordinance * * *”.

In *Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571, 69 L. Ed. 1070 (1924), the Society of Sisters sought an injunction restraining the Governor and other officials of Oregon from threatening to enforce a school law requiring parents to send children to primary schools of the state. The suit was brought before the effective date of the Act. The plaintiff claimed injury arising from the reluctance of parents to make commitments to send their children to the plaintiff's school in view of the existence and possible future enforcement of the Act. The Court said, 268 U. S. 536:

“The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future”.

See also

Terrace v. Thompson, 263 U. S. 197, 44 Sup. Ct. 15, 68 L. Ed. 255 (1923);

Aetna Life Insurance Company of Hartford v. Haworth, 300 U. S. 227, 57 Sup. Ct. 461, 81 L. Ed. 617 (1937);

Curriu v. Wallace, 306 U. S. 1, 59 Sup. Ct. 379, 83 L. Ed. 441 (1939);

Gully v. Interstate Natural Gas Company, 82 F. (2d) 145 (C. C. A. 5th, 1936);

Davis v. American Foundry Equipment Company, 94 F. (2d) 441 (C. C. A. 7th, 1938);

Fidelity National Bank v. Swope, 274 U. S. 123, 47 Sup. Ct. 511, 71 L. Ed. 959 (1927);

Black v. Little, 8 F. Supp. 867 (E. D. Mich., 1934);

N. Y. and Puerto Rico S. S. Company et al. v. U. S., 32 F. Supp. 538 (E. D., N. Y. 1940);

Dewey & Almy Chemical Co. v. American Anode, 137 F. (2d) 68 (C. C. A. 3rd, 1943), at 69. Cert. denied, 320 U. S. 761;

Maryland Casualty v. Pacific Coal & Oil Co., 312 U. S. 270, 61 Sup. Ct. 510, 85 L. Ed. 826 (1941);

Work v. Louisiana, 269 U. S. 250, 46 Sup. Ct. 92, 70 L. Ed. 259 (1925).

In summary, the plaintiff is entitled, in this suit for a declaratory judgment, to be relieved from the “threat of official action resulting from his relation to a governmental agency” (30 Fed. Supp. 995, at 1008). It does not have to plead or show the possibility of irreparable damage from the threatened action. *Nashville, C. & St. Louis Ry. Co. v. Wallace*, *supra*, p. 59. It does not have to show that it is under any “immediate and impending danger”. It does not have to “await the pleasure of the District Attorney” (or the Board of Governors) “who may never begin his suit”. 30 Fed. Supp. 995, at 1008.

“The administrative order * * * is reviewable and it does not cease to be so merely because it is not certain whether the Commission” (or the Board of Governors) “will institute proceedings to enforce the penalty incurred under its regulations for non-compliance” (*Columbia Broadcasting System v. U. S.*, 316 U. S. 407, at 417).

This proceeding is timely. It is not premature.

* * * * *

As we have shown, the contention that the suit is premature is untenable. And, to say the least, it is not meritorious. Confronted with this strange, arbitrary and outrageous condition, pregnant with present and future damage, with absolutely nothing it can do to alter the situation or to have a determination of its rights except through the medium of a declaratory judgment, plaintiff bank seeks a determination of its rights as a stockholder in the defendant Reserve Bank. Is it going to lose its stock or is it not? One would think that the Reserve Bank would be equally as anxious to know whether or not this condition affecting its stock—a condition peculiar to this single stockholder and not applicable to any other stockholder in the bank—was a valid condition. What has the defendant Reserve Bank to gain by contriving to postpone a determination of this important question? How are its interests in any way prejudiced by an immediate solution of the question presented? One would naturally think

that it would seize the first opportunity to *assist* the plaintiff, as one of its stockholders, to clarify its position, instead of exercising all of its ingenuity to avoid a determination on the merits. The Reserve Bank is not a private litigant. It is a public institution. It is a servant of the plaintiff—not the plaintiff’s master. It owes a duty to the plaintiff to aid the plaintiff rather than to hinder it.

VII.

The claim of the Board of Governors and of the defendant Reserve Bank of a right to deprive the plaintiff of its stock in the defendant Reserve Bank by an enforcement of condition No. 4 is an adverse claim within the purview of Section 738 of the Code of Civil Procedure of California, the existence of which adverse claim the Federal Court in this case can ascertain and declare in a declaratory judgment proceeding.

This is an additional and sufficient ground for giving relief to the plaintiff. In Paragraph VIII of the complaint (*supra*, p. 4), it is alleged that:

“Plaintiff further asserts that said void condition No. 4 is a cloud upon the title to the said shares of defendant, the Federal Reserve Bank of San Francisco, owned by plaintiff”.

Section 738 of the California Code of Civil Procedure provides as follows:

“An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim; * * *.”

Under this section an action may be brought to remove a cloud on title—even where the invalidity of the document constituting the cloud is apparent on the face thereof.

Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944 (Sup. Ct., Cal. 1900); *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55 (Sup.

Ct., Cal. 1890); *Miller v. Price*, 103 Cal. App. 650, 284 Pac. 1035 (Dist. Ct. of App. 3d Dist. Cal. 1930). 25 California Law Review, 565 at 570 (1937).

The words "personal property" as used in Section 738 have been held to include shares of stock, and in *Barr v. Smith*, 201 Cal. 87, 255 Pac. 827, (Sup. Ct., Cal. 1927) the court so held in an action to quiet title. In this connection it should be noted that in *Jellenick v. Huron Copper Mining Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647 (1899), the Supreme Court of the United States held that the words "personal property" as used in 28 U. S. C. A. Sec. 118, also apply to shares of stock, and that an action could be maintained under that section to remove a cloud upon the title to such shares.

In support of its holding that the suit "may not properly be maintained as one to remove a cloud upon the title of plaintiff's stock in the Reserve Bank" (R., p. 164), the District Court said:

"Finally, it is my opinion that there is no merit in plaintiff's contention that condition No. 4 constitutes a cloud upon the title to plaintiff's stock in the Reserve Bank or an adverse claim affecting the same, in the nature of a cloud, the existence of which the Court has power to remove. Plaintiff's shares in the Reserve Bank are a mere incident to its membership therein. This stock is non-transferable, non-negotiable and has no 'market value'. Title to this stock must, under the law, remain in plaintiff bank so long as it is a member bank and, when and if that status is forfeited, the title to the stock is likewise forfeited. None of the defendants claims an estate or interest in the stock adverse to plaintiff. Clearly a case is not presented which is governed by section 738 of the California Code of Civil Procedure. The suit sounds *in personam* against the Board of Governors for alleged abuse of discretion, not *in rem*."

a. Plaintiff's shares in the Reserve Bank are more than a "mere incident to its membership therein", but whether or not a mere incident they are property of the kind with respect to which the plaintiff is entitled to have an adverse claim adjudicated.

True it is that in order to be a member of the Federal Reserve System, the only qualification required by law is that the plaintiff bank shall become a stockholder in the defendant Reserve Bank. But being a stockholder in the defendant bank, it has most, if not all, of the customary rights of the stockholder. As such stockholder, plaintiff has the right to vote for directors of the defendant bank. It has the right to receive mandatory dividends on its stock. It has the right upon a surrender of its shares to receive back the subscription price paid for its shares, less its debts to the Reserve Bank. Stock in a Reserve Bank is subject to double liability (Title 12, Sec. 502). Non-voting stock may be held by the United States and sold to others. Any stock held by the public is transferable on the books of the bank (Title 12, Sec. 283), and there are no provisions for the cancellation of such stock. The Board of Governors has express authority to promulgate rules and regulations governing the transfer of stock (Title 12, Sec. 286).

We respectfully submit that there is no merit in the District Court's view that the plaintiff's stock in the defendant Reserve Bank is a mere incident. We do not see that that has any bearing upon the matter whatsoever. Whether a mere incident or not, it is a very valuable piece of personal property. It is stock—very valuable stock. Its continued ownership—loss of which is threatened under condition No. 4—is of the utmost importance. And as such the plaintiff has a right to have a determination of the validity of adverse claims affecting the same.

b. The District Court next states that "this stock is non-transferable, non-negotiable and has no 'market value'".

We respectfully submit that these facts have no bearing on the situation whatsoever. *The California Code imposes no such limitation.* The code applies to an adverse claim to *any* property. Whether the property of the plaintiff affected by an adverse claim of the defendant is transferable or negotiable or has "market" value is, we submit, of no consequence. It, of course, is of consequence that the

property in question has actual value, and, obviously this property has a great deal of actual value. It has not only the value that the plaintiff paid for it, it has value as an earner of dividends and it has very great value, to quote the brief of the defendant Reserve Bank in the court below, because of the resultant membership in the Reserve Bank which carries with it "a certain prestige and many practical advantages". Among these are the practical advantages of the position, which results from the ownership of that stock, of being an insured bank.

c. The District Court next states that "none of the defendants claims an estate of interest in the stock adverse to the plaintiff". On the contrary, we submit, the claim of the defendant Reserve Bank of the right to cancel the defendant's stock on its records in the enforcement of an order made by the Board of Governors directing the plaintiff to surrender its stock is an adverse claim affecting the plaintiff's property within the purview of the California statute.

We respectfully submit that the District Court entirely misapprehended the scope and extent of claims affecting property which come within the description of "adverse" claims under the California Code, or which, under that code, constitute what are generally spoken of as clouds on title. For a claim to constitute an adverse claim or to constitute a cloud on title it is not at all essential that the defendant should assert a legal or equitable interest in the plaintiff's property by virtue of the claim. The California courts have not given the phrase "an estate of interest" appearing in Sec. 738 of the California Code, the narrow construction given to it by the District Court in this case.

In *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946 (Sup. Ct., Cal. 1889), the Court laid down the law respecting Sec. 738 of the Code as follows (p. 947):

"Nor is it necessary that the adverse claim should be of any particular character. As said by BALDWIN, J., delivering the opinion in *Head v. Fordyce*, 17 Cal. 151, the statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title

or even an equitable title; but *the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretention*'. See, also, *Horn v. Jones*, 28 Cal. 204; *Joyce v. McAvoy*, 31 Cal. 287, 288. *And the rule may be even more broadly stated, viz., that the action may be maintained by the owner of property to determine any adverse claim whatever, for, if the defendant, by his answer, disclaims all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must be without costs.*"

Accord, see *Hamilton v. Elvidge*, 132 Cal. App. 21, 22 P. (2d) 239 (D. C. of App., First Dist. Cal. (1933), *Welsh v. Plumas County*, 22 Pac. 254 (Sup. Ct. Cal. 1889).

Los Angeles v. Los Angeles Water Company, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886 (1900), at 580 is in point. That case involved the validity of an ordinance of the city establishing water rates below those named in the original grant to the Water Company. One of the contentions of the defendant city was that the ordinance, if invalid, was void on its face and was therefore "no cloud on the company's title" to its original franchise. The Supreme Court sustained the determination of the lower court to the effect that the invalid ordinance constituted a cloud on the Water Company's title to its original franchise. Obviously here was no case where the defendant, the city, was asserting an "estate of interest" in the plaintiff's property. An invalid ordinance constituted the cloud. In the instant case, another type of legislation, an invalid condition, constitutes the cloud.

Semble, *Spring Valley Water-Works v. Bartlett*, 16 Fed. 615 (Cir. C. D. Cal., 1883).

In *Rector, etc., of St. Stephens Protestant Episcopal Church v. Rector, etc., of Church of the Transfiguration*, 114 N. Y. Supp. 623 (App. Div. First Dept., 1909), *affd.*, 201 N. Y. 1 (1911), the plaintiff had acquired property from the de-

fendant by a deed which contained a restrictive clause providing that the grantee, his heirs and assigns, should not thereafter utilize the property for any purpose other than church purposes. There was no adjoining property of any kind belonging to the defendant for the benefit of which the restrictive covenant had been imposed. The court held that the lack of any enforceable interest in the defendant was not a bar to the action and granted the relief required, saying (114 N. Y. Supp. 623, at 629):

“It is also objected that no equitable relief should be awarded to the plaintiff in this action because, even if the covenant is not void upon its face, its invalidity arising from the lack of enforceable interest on the part of defendant will necessarily appear in any proceeding taken to enforce the covenant. It is doubtful if this is strictly true, but, even if it is, it is not necessarily an answer to plaintiff’s demand.”

It would be difficult to think of a claim more adversely affecting plaintiff’s property than the claim of a right in the defendant to take that property entirely away from the plaintiff and to destroy the plaintiff’s ownership therein. In the language quoted from *Castro v. Barry, supra*, an “adverse claim” embraces “every description of claim whereby the plaintiff might be deprived of the property * * * or its value depreciated * * *”. What could be more adverse to the plaintiff? What could constitute more of a cloud upon its property? If in the *Los Angeles Water Company* case, 177 U. S. 558, *supra*, the passage by the city of an ordinance reducing the rates in the Water Company’s franchise constituted, as was so held by the court, a cloud upon the title of the Water Company to its franchise, *a fortiori* a claim by the City of Los Angeles of a right to entirely cancel the Water Company’s franchise would have constituted a cloud on its title. That is the nature of the right which counsel for the Reserve Bank in his argument in the District Court admitted that the Reserve Bank would exercise. It would cancel the stock of the plaintiff (R., p. 114).

(d) The District Court next states that the “suit sounds in personam * * * not in rem”.

We respectfully submit that the fact that the suit would appear to be a suit *in personam* is of no consequence. Section 738 of the California Code of Civil Procedure expressly contemplates that the suit should be a suit *in personam*. It states: “An action may be brought by any person against another * * *” (*supra*, p. 69).

In fact it would appear that most (if not all) of the suits which have been brought under Section 738 of the California Code of Civil Procedure have been in the nature of *in personam* proceedings.

See:

Marra v. Aetna Construction Company, 15 Cal. (2d) 375, 101 P. (2d) 490, (Sup. Ct. Cal. 1940), *infra*.

In 51 Corpus Juris 141 the nature of a proceeding required to remove a cloud on title is summarized as follows:

“The fundamental doctrine of equity, as originally administered, that every action in equity is purely an action *in personam*, applies to actions to remove clouds from title, unless abrogated by statute. But it is generally held that actions under statutes providing for the determination of adverse claims are in the nature of proceedings *in rem*, or quasi *in rem*. Some authorities have held that the character of the statutory action is determined by the nature of the process; that is, where personal service can be made, the action is *in personam* as well as *in rem*, but where service can be obtained only by publication, the action is *in rem*.”

In the present case, the suit was begun by personal service against the defendant Reserve Bank, and therefore, we do not have to bother with the question as to whether the action as to that bank is *in rem* or *in personam*.

We therefore respectfully submit that the District Court fell into error in the final reason which it assigned on this aspect of the case, to-wit, that "the suit sounds *in personam* * * * and not *in rem* * * *".

(e) A declaratory judgment proceeding is appropriate for the determination of an adverse claim.

From the language of Section 738 of the California Code of Civil Procedure, it would seem that it contemplated a declaratory judgment as an appropriate way of dealing with the adverse claim. The statute (*supra*, p. 69) reads as follows:

"An action may be brought by any person against another * * * for the purpose of *determining* such adverse claim;"

The combination of the declaratory judgment and a proceeding to quiet title is specifically recognized by the California court.

In *Marra v. Aetna Construction Co.*, 15 Cal. (2d) 375, 101 P. (2d) 490 (Sup. Ct. Cal., 1940), plaintiff brought an action to obtain a declaration that his real property was free of certain building restrictions. The defendant was the owner of adjoining property. The court said, among other things (101 P. (2d) 490, at 492):

"However, since the decision of this court in *Hess v. Country Club Park*, 213 Cal. 613, 2 P. 2d 782, it has been settled that an owner may test the enforceability of covenants or servitudes asserted against his property *in a suit for declaratory relief* and to quiet title. He is not required to violate the restrictions at the risk of suffering the penalties which might result from such a breach in order to ascertain his legal rights. See 50 Harv. L. Rev. 171, 217; *Osius v. Barton*, 109 Fla. 556, 147 So. 862, 88 A. L. R. 394, 405."

Accord *Moe v. Gier*, 116 Cal. App. 403, 2 P. (2d) 852 (Dist. Ct. of App. Cal. 1931).

See also :

Wickliffe v. Owings, 17 How. 47, 58 Sup. Ct. 15 L. Ed. 44 (1854) ;

Williams v. Atlantic Coast Line R. R., 17 F. (2d) 17 (C. C. A. 4th, 1927) ; and

Wolf v. Gall, 174 Cal. 140, 162 Pac. 115 (Sup. Ct. Cal., 1916).

(f) In states where there is a statute providing for the removal of adverse claims, even where such statute clearly enlarges the jurisdiction theretofore possessed by the courts with respect to the removal of such claims, the courts of the United States will give effect to the local statute.

In *Louisville & Nashville R. R. Co. v. Western Union Telegraph Company*, 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 356 (1914), there was a Mississippi statute, quite similar to Section 738 of the California Code of Civil Procedure. In this case by a bill in equity the plaintiff sought the annulment of three judgments given by a condemnation court, as constituting a cloud upon a title to his property. The main defense was that the bill would not lie, in that the condemnation judgments, if void at all, were void on their face. The Court first found that under the Mississippi statute the state courts would have removed the cloud notwithstanding that the invalidity was apparent on the face of the alleged cloud, and went on to say (234 U. S. 369, at 376) :

“We conclude that the provision in Sec. 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several States, as well as when resting upon established usages and practice in equity.”

See *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51 (1887) ; *Smith Oyster Co. v. Darbee, etc., Co.*, 149 Fed. 555 (C. C. N. D. Cal. 1906) ; *Devine v. Los Angeles*, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046 (1906).

(g) No contention can be made that a proceeding to remove an adverse claim is premature.

A plaintiff confronted with an adverse claim affecting his property is entitled to have his rights determined at any time, irrespective of whether he is confronted with any threat of action, immediate or otherwise, by the holder of the adverse claim.

Marra v. Aetna Construction Company, 15 Cal. 2nd 375, 101 Pac. (2d) 490 (Sup. Ct. Cal. 1940), *supra*.

In fact it is well established that a plaintiff can bring a suit to prevent the casting of a cloud on the title to his property as well as to remove an existing cloud. 44 Am. Jur. Sec. 17.

See also:

Carroll v. Safford, 3 How. 440, 44 Sup. Ct. 500, 11 L. Ed. 671 (1845);

Allen v. Hanks, 136 U. S. 300, 10 Sup. Ct. 961, 34 L. Ed. 414 (1890);

Lane v. Watts, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. Ed. 1440 (1914); and

Title and Document Restoration Company v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906).

VIII.

Henry F. Grady, as Federal Reserve Agent, is a proper, although not an indispensable, party defendant.

The statute (Sec. 305, Title 12) provides, as above stated (p. 8) that one of the class C directors of a Reserve Bank shall be designated as Chairman of the Board of Directors of the Federal Reserve Bank and as "the Federal Reserve Agent" and that "he * * * shall act as its (the Board's) official representative for the performance of the functions conferred upon it by this chapter."

The Board of Governors is a body that by its very nature can only act through representatives or agents. The statute, therefore, makes it mandatory that whenever it acts within a particular district, it may only employ or utilize the Federal Reserve Agent as its representative. The statute makes it clear that such employment extends to every act or function which the Board can perform. It may not select the Federal Reserve Agent as its representative with respect to certain functions, and delegate other functions to some other agent, such, as for example, the local Federal Reserve Bank.

The Board of Governors has conferred numerous functions on the Federal Reserve Agent in connection with a state bank's membership in the system. Part 208 of Chapter II of Title 12 of the Code of Federal Regulations contains these regulations of the Board with respect to the membership of state banking institutions in the Federal Reserve System.

It would seem from these regulations that the channel of approach through which a state bank may deal with the Board in applying for membership and in withdrawing from membership is by the Board's own regulations confined to the Federal Reserve Agent. Through him the Board is acting within the district in the very matter with which this litigation is concerned.

In the event of the attempted enforcement by the Board of Governors of condition No. 4, embraced in an invalid order to the plaintiff bank to "surrender its stock" in the defendant Reserve Bank and the plaintiff's disobedience of this invalid order, it may well be that the Board of Governors would attempt to do something in California against the plaintiff. We do not need to speculate what course of action it may devise. We have no doubt that the Reserve Agent intends to do whatever he may be required to do. We so allege. And on the motion to dismiss the allegation is admitted. Whatever the Board may do in California, it is required by law to do through the Federal Reserve Agent. It is consequently appropriate that he should be a party defendant to this suit and be heard on

the questions involved and that the plaintiff should have a declaration of rights as to him.

In Conclusion.

It is incredible that the people of the United States, who are still the source of all authority, or their Congress, have or ever had any intention of vesting any Federal Agency with the power to single out and name a person or corporation as unfit or disqualified to be associated with others in a given lawful human activity, except as a punishment after trial and conviction of some offense known to the law; nor can it be believed that so-called subalterns shall be immune from those processes of law and restraints to which all persons are subject, because these so-called subalterns act or attempt to act pursuant to and upon the authority of the void and unconscionable orders of their superiors and especially when such acts operate to deprive other citizens of rights guaranteed them under the Constitution.

The order of the District Court dismissing the complaint as against the defendant Federal Reserve Bank and as against the defendant Henry F. Grady, the Federal Reserve Agent, should be reversed.

Respectfully submitted,

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PEOPLES BANK,

Appellant,

vs.

FEDERAL RESERVE BANK OF SAN FRANCISCO
and HENRY F. GRADY, Federal Reserve Agent,

Appellees,

and

FEDERAL RESERVE BANK OF SAN FRANCISCO,

Appellant,

vs.

PEOPLES BANK,

Appellee.

MEMORANDUM IN OPPOSITION TO THE MOTION OF THE FEDERAL RESERVE BANK AND OF HENRY F. GRADY TO DISMISS THE APPEAL OF THE PEOPLES BANK.

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CLERK

INDEX.

	PAGE
STATEMENT OF FACTS.....	3
POINT I.—Upon the dismissal of a complaint, the rules of civil practice contemplate only the entry of judgment by the clerk following the direction of the court, which direction may be, and generally is, as in the instant case, included in the opinion....	6
POINT II.—The so-called judgment of January 8, 1945 is mere repetitious surplusage not contemplated by the present rules of civil practice.....	11
POINT III.—In accordance with the contemplation of the rules, although the so-called judgment had already been entered, both appellant and appellees chose “the order of November 17, 1944” as the order which they designated in their respective notices of appeal and cross appeal as constituting the <i>final</i> decree and cooperated in the perfection of the Record on Appeal on that basis.....	13
POINT IV.—Whatever constitutes the order of the District Court dismissing the complaint, the notice of appeal filed by the appellant is a satisfactory notice of appeal therefrom.....	15
POINT V.—An order dismissing a complaint is a final judgment from which an appeal may be taken.....	22
A. The decisions of this Court.....	22
B. The decisions in the other Circuits.....	27
POINT VI.—If the “Order on Motions” of November 17, 1944 should be deemed to be the order appealed from, it is not important that the order does not contain the words “the complaint is dismissed”, particularly since the opinion of the District Court contains that very determination and directs that the order shall be in accordance therewith.....	29
CONCLUSION	34

TABLE OF AUTHORITIES CITED.

	PAGE
<i>Ainsworth v. Gill Glass & Fixture Co.</i> , 3 Cir., 104 F. 2d 83, 84.....	32
<i>Amsinck & Co. v. Springfield Grocer Company</i> , 7 F. (2d) 855 (C. C. A. 8th, 1925).....	28
<i>Atwood v. National Bank of Lima</i> , 115 F. (2d) 861 (C. C. A. 6, 1940).....	27
<i>Bailey v. Crump</i> , 41 F. (2d) 733 (1930).....	27
<i>Baird v. Peoples Bank</i> , 120 F. (2d) 1001 (1941).....	27
<i>Bensen v. U. S.</i> , 93 F. (2d) 749 (C. C. A. 9th, 1937)....	26
<i>Charles D. Leffler</i> , 100 F. (2d) 759 (C. C. A. 3rd, 1938)	34
<i>City and County of San Francisco v. McLaughlin</i> , 9 F. (2d) 390, decided in 1925.....	22, 23, 24, 25
<i>Clarke v. Chase Bank</i> , 137 F. (2d) 797 (1943).....	27
<i>Collins v. Metro-Goldwyn Corp.</i> , 106 F. (2d) 83 (1939)	27
<i>Continental National Bank v. National City Bank</i> , 69 F. (2d) 312, decided in 1934.....	22, 23
<i>Crosby v. Pacific Lines</i> , 133 F. (2d) 470.....	2, 17, 18, 21, 22, 23, 25, 26, 27, 29, 30, 31, 32
<i>Crump v. Hill</i> , 104 F. (2d) 36 (C. C. A. 5th, 1939) 15, 17, 18, 32, 33	
<i>Dyar v. McCandless</i> , 33 F. (2d) 578 (C. C. A. 8th, 1929)	28
<i>Gulf Refining Co. v. U. S.</i> , 269 U. S. 125 at 135, 1925....	9
<i>Hicks v. Bekins Moving & Storage Co.</i> , 115 F. (2d) 406, decided in 1940.....	22, 23, 24, 25, 26, 27
<i>Iowa-Nebraska Light Company v. Daniels</i> , 63 F. (2d) 322 (C. C. A. 8th, 1933).....	27
<i>Jefferson Electric Company v. Sola Electric Co.</i> , 122 F. (2d) 124 (C. C. A. 7th, 1941).....	6, 27
<i>Johnson v. Wilson</i> , 118 F. (2d) 557 (C. C. A. 9th, 1941)	12, 20, 22, 23, 24, 25, 26, 27, 31, 32

<i>Karl Kiefer Manufacturing Company v. U. S. Bottlers Machinery Company</i> , 108 F. (2d) 469 (C. C. A. 7th, 1939)	27
<i>Leonard v. Socony Vacuum Oil Company</i> , 130 F. (2d) 535 (C. C. A. 7th, 1942).....	29
<i>Martin v. Casualty Insurance Company</i> , 138 F. (2d) 896 (1943)	27
<i>Martin v. Clarke</i> , 105 F. (2d) 865 (C. C. A. 7th, 1939)	17
<i>Metropolitan Company v. Kaw Valley District</i> , 223 U. S. 519, 523.....	10
<i>Milton v. United States</i> , 120 F. (2d) 794 (C. C. A. 5th, 1941)	8, 11, 17, 19, 21, 33
<i>Monarch Brewing Company v. George J. Meyer</i> , 130 F. (2d) 582, decided in 1942.....	23, 24, 25, 26
<i>Musher Foundation v. Arbitrating Company</i> , 127 F. (2d) 9 (C. C. A. 2d, 1942).....	27
<i>Norton v. Larney</i> , 266 U. S. 511, 516, 45 Sup. Ct. 145, 69 L. Ed. 413.....	26
<i>Odell v. Batterman & Co.</i> , 223 Fed. 292, 295 (C. C. A. 2nd, 1915)	32
<i>Rardin v. Messick</i> , 7 Cir., 78 F. (2d) 643.....	20
<i>Realty Holding Co. v. Donaldson</i> , 268 U. S. 398, 400 45 Sup. Ct. 521, 69 L. Ed. 1014.....	26
<i>Safeway Stores v. Coe</i> , 136 F. (2d) 771 (Court of Appeals of the District of Columbia, 1943)....	17, 18, 28, 34
<i>Schendel v. McGee</i> , 300 Fed. 273 (C. C. A. 8th, 1924)..	28
<i>Shannon v. Retail Clerks International P. Assn.</i> , 128 F. (2d) 553 (C. C. A. 7th, 1942).....	10, 17, 20, 34
<i>Sosa v. Royal Bank of Canada</i> , 134 F. (2d) 955 (C. C. A. 1st, 1943).....	11, 12, 15, 27
<i>State of Missouri v. Todd</i> , 122 F. (2d) 804 (C. C. A. 8th, 1941)	34
<i>U. S. v. Ellicott</i> , 223 U. S. 524, 539.....	17, 34
<i>Vietti v. Wayne</i> , 136 F. (2d) 771 (U. S. Court of Appeals for the District of Columbia, 1943).....	28

	PAGE
<i>Western Union Telegraph Company v. Dismang</i> , 106 F. (2d) 362 (C. C. A. 10th, 1939).....	7, 11, 27
<i>Wright v. Gibson</i> , 128 F. (2d) 865, decided in 1942....	22, 24 25, 26
<i>Zadig v. Aetna Insurance Co.</i> , 42 F. (2d) 142 (C. C. A. 2nd 1930)	9, 23, 27, 28
<i>Zalkind v. Scheinman</i> , 139 F. (2d) 895 (1943).....	27

AUTHORITIES.

Rules of Civil Practice:

Rule 1	16
Rule 41(b)	6, 7, 26
Rule 54	6, 7
Rule 58	7, 8, 11, 26
Rule 60(a)	25, 31
Rule 73(a)	15, 16
Rule 73(b)	15, 16, 17
Rule 79(a)	11, 26
3 American Jurisprudence, Secs. 472 and 473, pp. 168-9	18
Hughes, Federal Practice, Vol. 19, p. 48.....	17
10 Cyc. of Federal Procedure, 2d Edition, p. 262.....	28

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PEOPLES BANK,
Appellant,

vs.

FEDERAL RESERVE BANK OF SAN FRAN-
CISCO AND HENRY F. GRADY, Federal
Reserve Agent,

Appellees,

and

FEDERAL RESERVE BANK OF SAN
FRANCISCO,

Appellant,

vs.

PEOPLES BANK,
Appellee.

No. 11002.

MEMORANDUM IN OPPOSITION TO THE MOTION OF THE FEDERAL RESERVE BANK AND OF HENRY F. GRADY TO DISMISS THE APPEAL OF THE PEOPLES BANK.

We respectfully submit that this motion is without merit—either in law or in justice. In law, the appeal complies with the statute and with the rules. Under the statute—the appeal was timely and it was taken from a final judgment. Under the rules, as we shall show—the notice of appeal was directed to the proper order of the District Court to be appealed from. *In our opinion, there does not exist even a technical defect justifying this motion.*

In Summary, an order dismissing a complaint is a final order from which an appeal may be taken (Point V). There

are at least three (and possibly four) such orders (Point I): (1) the order contained in the Opinion, filed November 17, 1944; (2) the Order on Motions, filed November 17, 1944 (the clerical omission in this order of the words "the complaint is dismissed" is of no consequence (Point VI)); (3) possibly, Nos. (1) and (2) taken together as constituting the order of November 17, 1944; and (4) the so-called judgment of January 8, 1945. It is clear that this last order is repetitious surplusage (Points I and II); and was so regarded by all parties (Point III). By its notice of appeal the plaintiff expressly appealed from an order granting the motion to dismiss the complaint and dismissing the complaint. Plaintiff further described the order as being "the order dated the 17th day of November, 1944". The plaintiff made a correct selection, but even if the plaintiff made an incorrect selection and should have selected the so-called judgment of January 8, 1945 as being the order embodying the final decision from which it clearly and expressly appealed, the reference to the wrong order is of no consequence (Point IV). The appeal is still good.

As to the justice of the motion, we will make no comment. The motion takes one back to the practice before the present rules, when taking an appeal was a kind of tricky game, under which on occasion more attention was paid to form than to substance. It is noteworthy, however, that in this Court, so far as we have been able to ascertain, no appellant has finally lost his right to have the merits of his case considered by this Court, through any purely unsubstantial technical defect in a timely notice of appeal which fully informed the appellee of what the appeal was about.

In the light of the decision of this Court in the recent case of *Crosby v. Pacific Lines*, 133 F. (2d) 470, it would seem unnecessary to brief or argue a motion to dismiss an appeal of so little substance. The matter, however, is of such great importance to the appellant, that we have felt it incumbent upon us to present the Court with an extended discussion of the law and the facts.

Statement of Facts.

In opposition to the motion of the Federal Reserve Bank (hereinafter sometimes referred to as the Reserve Bank), and to the similar motion of Henry F. Grady, the appellant, Peoples Bank, relies upon the Transcript of Record on Appeal in this case as supplemented by the order of the District Court of April 26, 1945, the affidavit of Kenneth M. Johnson, verified May 21, 1945 and the affidavit of Carl M. Owen, verified May 15, 1945, filed herein.

By its complaint (R., p. 3), the appellant, Peoples Bank, sought a declaratory judgment against the Federal Reserve Bank of San Francisco, as principal defendant, and Henry F. Grady, as Federal Reserve Agent, declaring that a certain condition attached to the stock of the Peoples Bank in the Reserve Bank was invalid. The defendants moved to dismiss the complaint (R., p. 12).

On November 17th, 1944, Hon. Michael J. Roche, United States District Judge who heard the case, filed his Opinion (R., p. 149). This Opinion concluded as follows (R., p. 165):

“4. The motions to dismiss filed by each of the defendants will be granted.

“* * * *Therefore, this complaint is dismissed* as to all defendants for lack of jurisdiction of this Court.

“*An order will be entered in accordance with this opinion*” (R., p. 165). (Italics in this brief ours unless otherwise noted.)

It is noteworthy that the Court directed that “*an order*”—not a judgment—should be entered. Nor did the Court say an order *and* a judgment.

On the very same day, November 17th, 1944, there was filed an order of the District Court which was entitled “Order on Motions”, reading in part as follows:

“Each of the motions to dismiss and the motion of the defendant Federal Reserve Bank of San Francisco to strike plaintiff’s motion for summary judgment are therefore granted * * *” (R., p. 148).

By obvious error of *omission*, this Order on Motions did not go on to say, "and the complaint is dismissed".

No right was given to the plaintiff, by this order, to plead again. The order was final.

This order said nothing about any subsequent judgment to be entered either in the same or different terms. Nevertheless, on January 8th, 1945, the so-called "judgment" in this case was entered. This judgment was prepared by counsel for the Reserve Bank, and approved as to form by counsel for appellant. It directed for the third time what had already been directed twice before.

Thereafter on January 15th, 1945, the appellant, Peoples Bank, filed its notice of appeal, reading in part as follows:

"Notice is hereby given, that the Peoples Bank, plaintiff above named, hereby appeals * * * from that part of the order of the above entitled Court, Hon. Michael J. Roche, Judge Presiding, dated the 17th day of November, 1944, * * * which (a) grants the motion of defendant Federal Reserve Bank to dismiss and (b) grants the motion of defendant Henry F. Grady to dismiss and (c) dismisses said action as against said defendant" (R., p. 165).

On January 18th, 1945, the appellant, Peoples Bank, filed its statement of points upon which the appellant intends to rely (R., p. 166). These points go to the very meat of the whole controversy.

On January 18th, 1945, the appellant filed its designation of the portions of the record to be contained in the Record on Appeal. This designation included the Opinion and the Order on Motions of November 17, 1944. It did not include the so-called judgment.

On January 26th, 1945, appellee Henry F. Grady filed a designation of additional portions of the record to be included in the Record on Appeal (R., p. 169). *He did not designate the judgment.*

On February 3rd, 1945, the Federal Reserve Bank filed its notice of appeal in which it "hereby appeals and cross-appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that part of the *Order* of the above

entitled Court, Hon. Michael J. Roche, Judge presiding, dated the 17th day of November, 1944, and entered in the above cause, which denies the motion of the defendant Federal Reserve Bank of San Francisco for Summary Judgment'' (R., p. 171).

On February 5th, 1945, the Federal Reserve Bank filed its statement of points on which it intended to rely on its cross-appeal (R., p. 172).

On February 5th, 1945, the defendant Federal Reserve Bank filed its designation of the portion of the record to be contained in the record on appeal on its cross-appeal (R., pp. 172, 173, 175). *It did not designate the judgment.*

Subsequently, on February 6th, 1945, the Federal Reserve Bank of San Francisco filed an amended designation of additional portions of the record to be included in the Record on Appeal (R., pp. 176, 177). *Again, it did not designate the judgment.*

On March 7, 1945, Mr. Agnew, counsel for the Federal Reserve Bank, wrote to Mr. Owen, of counsel for the appellant, Peoples Bank, suggesting, in the interest of reducing the number of briefs on the appeal and cross appeal from a possible six to four, that the appellee's reply brief to the appellant's main brief should also include the appellee's main brief on his cross-appeal. On March 21, 1945, Mr. Owen replied to this letter, accepting the suggestion (Affidavit of Owen).

On April 20, 1945, the appellants served their notice of the motion now before this Court to dismiss the appeal of the Peoples Bank.

On April 26, 1945, attention of counsel for the Peoples Bank having been drawn to the fact that the "Order on Motions" of the District Court entered on November 17th, 1944, was not in "accordance" with the directions of the Court's Opinion, as the Court had directed that it should be, in that the order failed to include the words "and the complaint is dismissed", made a motion under Rule 60(a) to have the obvious "omission" corrected so as to bring the order in "accordance" with the opinion of the Court.

Under date of April 26, 1945, an order of the District Court was entered herein denying this motion.

By the said order of April 26, 1945, the said order and the so-called judgment of January 8, 1945 were added to the record on appeal, and, accordingly, are now before this Court.

Appellant's main brief on the merits, on which a great deal of time and effort had been spent, was in print when the motion to dismiss this appeal was noticed; accordingly, it has been filed and served.

P O I N T I .

Upon the dismissal of a complaint, the rules of civil practice contemplate only the entry of judgment by the clerk following the direction of the court, which direction may be, and generally is, as in the instant case, included in the opinion.

(a) Under the rules, the opinion of the District Court itself constituted an order which, when entered, could be appealed from.

Rule 54 provides as follows:

“Definition: Form. ‘Judgment’ as used in these rules includes a decree and any order from which an appeal lies”.

Rule 41(b) of the Rules of Civil Practice provides as follows:

*“Involuntary Dismissal: Effect Thereof. * * **
Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for a lack of jurisdiction or for improper venue, operates as an adjudication upon the merits”.

In *Jefferson Electric Company v. Sola Electric Co.*, 122 F. (2d) 124 (C. C. A. 7th, 1941) which involved a motion

to dismiss an appeal from an order dismissing a counterclaim, the Court held that "the effect of this rule" [Rule 41(b)] "is to render a dismissal of the counterclaim an adjudication on the merits appealable if at all, like any other final order * * *".

Rule 58, entitled "Entry of Judgment" provides:

" * * When the Court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the Clerk shall enter judgment forthwith upon receipt by him of the direction; but when the Court directs entry of a judgment for other relief, the Judge shall promptly settle or approve the form of the judgment and direct that it be entered by the Clerk".*

In the instant case, in conformity with Rule 58, the District Court in its opinion expressly directed the entry of a judgment ("order"—see Rule 54) in "accordance with this Opinion" which, in itself, directs that the motion of the defendants to dismiss the complaint should be granted and that "this complaint is dismissed". Based upon this, the correct procedure under the rules would have been for the clerk to "enter judgment forthwith" without more. *Not even the "Order on Motions" of November 17th, 1944 was required.*

Further, the so-called judgment of January 8th, 1945 clearly is surplusage (see Point II, infra).

In *Western Union Telegraph Company v. Dismang*, 106 F. (2d) 362 (C. C. A. 10th, 1939), on a motion to set aside a verdict for the plaintiff, the Court wrote an opinion, the closing sentence of which read: "Therefore, the verdict is set aside and judgment entered for the defendant". The opinion was filed in the cause, and the Clerk, pursuant to the direction of the Court contained in its opinion, entered the following order on the docket:

"Enter order motion of defendant for directed verdict sustained. Verdict of jury set aside and judgment entered for the defendant" (105 F. (2d) 362, at 363).

The Court, after referring to Rule 58 of the Rules of Civil Practice, held that a final judgment had been made and entered, saying:

“The judgment is the pronouncement of the court from the bench. The clerk’s entry is not the judgment, but merely the formal evidence thereof. Under the new rules, it is not necessary for the court to sign a formal written judgment. The entry is made by the clerk in the performance of a ministerial duty.”

In *Milton v. United States*, 120 F. (2d) 794 (C. C. A. 5th, 1941), *supra*, the appeal was taken from an order denying a motion for a new trial and the defendant moved to dismiss the appeal. The Court disregarded the motion to dismiss the appeal and proceeded to decide the case on the merits, saying: (120 F. (2d) 794 at 795).

“The overruling of a motion for a new trial is not a final judgment within the meaning of Judicial Code 128, fixing our appellate jurisdiction in cases of this kind. On the other hand, there could be no doubt the verdict of the jury and the overruling of the motion for a new trial together constitute a final determination of the merits of the case. *It does not appear the judge gave any directions in regard to the entering of the judgment.* Other than that, there was nothing further for the judge to do. Under the provisions of Rule 58, Rules of Civil Procedure, 28 U. S. C. A. following section 723c it was the duty of the clerk to enter judgment upon the verdict. This should have been done promptly after the motion for new trial was overruled. Apparently, *the clerk did not do so. The rules of civil procedure were adopted to abolish technicalities and to expedite the due administration of justice. A complete record, including all the evidence, is before us.* We have carefully examined that record and find no reversible error. If appellant had appealed as from final judgment before the clerk entered the judgment it would have been premature but that would not have required the dismissal of the appeal. See *Luckenbach S. S. Co. v. United States*, *supra*. *That appellant has mistakenly appealed from the order overruling the mo-*

tion for a new trial in this case may be considered purely a technicality. In the interests of justice and to avoid prolonging the litigation for no good purpose, without intending to create a precedent, we consider we may disregard the motion to dismiss the appeal and decide the case on the merits."

In *Zadig v. Aetna Insurance Co.*, 42 F. (2d) 142 (C. C. A. 2nd 1930) the Court held that an order dismissing a cause without prejudice because no action had been taken by the plaintiff for one year was a final judgment, although not entered, saying:

"* * * it makes no difference what the court's determination be called so that it actually disposes of the suit and leaves nothing further to be done. Nor does the lack of entry affect the validity of the judgment * * *. * * * The only act of the court being the rendering of the judgment, in this case evidenced by a written 'order', entry is merely a ministerial duty of the clerk to perpetuate that act, though in most jurisdictions necessary to create a lien or start running the time to appeal" (42 F. (2d) 142, at 143).

In the instant case, the District Court, in its opinion filed on November 17, 1944, actually dismissed the complaint as to all defendants. That direction was an order. Appellant's notice of appeal refers to "The order of November 17th, 1944". That constitutes a proper reference to the directions in the opinion, as constituting an order, as well as to the so-called "Order on Motions".

(b) *At least, the order in the Opinion and the order in the so-called "Order on Motions", both made and filed on the same date, and being supplementary, one to the other, constitute together one order, to wit, "the order of November 17, 1944"*.

In *Gulf Refining Co. v. U. S.*, 269 U. S. 125 at 135, 1925, the Court said:

"The government first contends that the decrees are not final and that the appeal should be dismissed because the Court of Appeals remanded the cases

‘for further proceedings not inconsistent with the opinion of this Court’ * * * but the *direction to proceed consistently with the opinion of the Court has the effect of making the opinion a part of the mandate, as though it had therein been set out at length. Metropolitan Company v. Kaw Valley District*, 223 U. S. 519, 523. * * * The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value * * *. There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit.”

In *Shannon v. Retail Clerks International P. Assn.*, 128 F. (2d) 553 (C. C. A. 7th, 1942), two orders had been entered, one dated October 21, 1941, the other dated October 24, 1941. In phraseology at least, the October 24th order did not appear to be a modification of the earlier October 21st order. The notice of appeal referred to an “order dated October 20th”, there being no such order. The Court sustained the appeal, saying, among other things:

“The failure to correctly describe the order from which the appeal is taken, must be viewed in the light of the fact that although there were seemingly two separate orders, it would be better to describe them as one order, which was modified in part. On this record we would hardly be justified in dismissing the appeal because an erroneous date of the order is given in the notice of appeal” (128 F. (2d) 553 at 555).

We have no doubt that if the plaintiff in the instant case had not served his notice of appeal until, say, 80 days after the entry of the so-called judgment of January 8, 1945 and had directed his notice of appeal to that judgment, the Reserve Bank would then have moved to dismiss the appeal on the ground that the plaintiff had selected the wrong order to appeal from and that the time for appeal from the order

of November 17, 1944 had passed, the Reserve Bank then relying on the *Western Union* case, *supra*, *Milton v. United States*, *supra*, and *Sosa v. Royal Bank*, 124 Fed. 2d 955 *infra*. Clearly, the time within which notice of appeal must be given, which is statutory, and the failure to comply with which is fatal, was not extended in the instant case by the fact that the so-called judgment was not entered until January 8, 1945, approximately two months after the entry of the Court's Opinion and of the Order on Motions.

POINT II.

The so-called judgment of January 8, 1945 is mere repetitious surplusage not contemplated by the present rules of civil practice.

There was no direction in the Opinion for the so-called judgment. There was no direction in the Order on Motions for the so-called judgment. It is clearly not contemplated by the rules. And all the parties treated it as surplusage (Point III).

It is obvious on the face of the rules that they do not contemplate any such additional document as the so-called judgment. In fact the rules do not contemplate any document at all to be signed by the Court following its opinion. Rule 58 provides that "When the court directs the entry of a judgment that * * * *there be no recovery*, the Clerk shall enter judgment forthwith upon receipt by him of the direction * * *." The notation of a judgment in the civil docket as provided by rule 79(a) constitutes the entry of the judgment.

As above stated, the direction of the District Court in its Opinion in the instant case that "an order will be entered in accordance with this opinion" was a sufficient direction under Rule 58 for the Clerk to enter judgment accordingly in his docket—without more. Consequently, the so-called judgment is clearly repetitious surplusage, not called for by, or in harmony with, the rules. *It was quite properly disregarded by all the parties hereto.*

In *Sosa v. Royal Bank of Canada*, 134 F. (2d) 955 (C. C. A. 1st, 1943), a second judgment practically in the language of the first order was held to be “merely a reiteration” and it was held that the appeal was properly taken from the prior order. True it is that in that case the order contained the words “the complaint * * * is hereby dismissed”. The Circuit Court of Appeals in that case said: “But for that fact the order *probably* would not have been appealable”. It does not categorically commit itself on this position. But in the *Sosa* case, the opinion of the Court was apparently embodied in the order, whereas in our case, in the Court’s separate opinion is clearly found the order that “the complaint is dismissed”.

The so-called judgment of January 8th, 1945 is identical in its directions with the Order on Motions of November 17th, 1944, except that it contains a final paragraph reading: “It is accordingly Ordered, Adjudged and Decreed that this cause be and hereby is dismissed at plaintiff’s cost.”

The fact that “the order of November 17th, 1944” did not award costs and that the judgment of January 8th, 1945 did award costs does not deprive the prior order of November 17th, 1944 either as contained in the opinion or in the Order on Motions of its character as a final order. So decided in *Johnson v. Wilson*, 118 F. (2d) 557 (C. C. A. 9th, 1941).

POINT III.

In accordance with the contemplation of the rules, although the so-called judgment had already been entered, both appellant and appellees chose "the order of November 17, 1944" as the order which they designated in their respective notices of appeal and cross appeal as constituting the *final* decree and cooperated in the perfection of the Record on Appeal on that basis.

Whether, in referring in their respective notices of appeal and in their other papers, to the "order of November 17, 1944", the parties were referring to the order contained in the District Court's opinion, filed on November 17th, 1944, or to the "Order on Motions" filed on the same date, or to the combination of both of them, does not appear—*except* that the appellant Peoples Bank did in its notice, appeal from that part of the order which "(c) dismisses said action as against the said defendant", there being such an order in the Opinion and no such order expressly contained, in those words, in the Order on Motions.

It is clear that all the parties hereto treated what they referred to as "the order of November 17th, 1944" as a final order having the intent and effect of dismissing the complaint and cooperated in the perfection of an appeal therefrom. All the parties also acted in accord in treating the so-called "judgment" of January 8th, 1945 as mere surplusage.

(a) The District Court clearly indicated, we submit, that the order which was entered by it on its Opinion, was to be the final order. The Opinion stated three things categorically (R., p. 165):

1. "The motions to dismiss * * * will be granted".

2. "This complaint is dismissed as to all defendants * * *".

3. "An order will be entered in accordance with this opinion".

The order entered was entitled "Order on Motions" and stated "Each of the motions to dismiss * * * are therefore granted" (R., p. 148). Nothing is stated in this order or in the opinion about any subsequent judgment to be entered thereon.

(b) The appellant, Peoples Bank, although it filed its notice of appeal after the entry of the so-called judgment, directed its notice of appeal only to what it described therein as "the order of November 17, 1944," and made designations to the record only with respect to such an order. The appellant did not designate the so-called judgment as part of the record. The appellant clearly understood that "the order of November 17, 1944" was a final and effective order. It treated the so-called judgment as repetitious surplusage.

(c) Examining the conduct of the Reserve Bank, it is to be noted that the Reserve Bank is both an appellee and a cross-appellant. It appears that although the judgment, prepared by its counsel, was entered on January 8th, 1945, nevertheless, the appeal and *cross-appeal* which the Reserve Bank subsequently took on February 3, 1945 was an appeal from what it referred to in its notice of appeal as "the order of November 17, 1944." The Reserve Bank took no cross-appeal from the judgment. Neither did it in its designation of what was to be included in the record, *on the Peoples Bank appeal*, which was filed by it on January 26th, 1945, designate the judgment. Nor did the Reserve Bank in its designation of the matters to be contained in the record *on its own cross-appeal*, which was filed February 5th, 1945, designate the judgment, nor did it designate the judgment in its amended designation of matters to be included in the Record on Appeal which it filed February 6th, 1945. The Reserve Bank cooperated in every way with the plaintiff in getting up the Record on Appeal, and a record on its own cross-appeal, and in thereafter arranging for the manner of exchanging briefs, on the basis that "the order of November 17, 1944" was the final order to be appealed from, and that the so-called judgment was a superfluous repetition.

We must assume that the cross-appeal of the Reserve Bank from the denial of its motion for a summary judgment was taken in good faith and with an intent to be pressed. We must further assume, and we do assume, that the selection by the Reserve Bank of what its notice of cross appeal referred to as "the order of November 17, 1944" as the action of the District Court to be cross-appealed from, instead of the judgment of January 8th, 1945, which was prepared and entered by it, was a well considered selection, made in good faith and not designed to entice the appellant into a technical trap, such as it now asserts has caught the appellants.

(d) The conduct of the appellee-cross-appellant, Henry F. Grady was in exact accord with the conduct of the Reserve Bank, and consequently need not be set forth in detail.

In summary, therefore, it is clear from the conduct of the parties that they were in accord in considering what they all referred to as "the order of November 17, 1944" as the final appealable order, and cooperated, on that basis, in the preparation of the appeal papers and in the briefing of the case. Both parties treated the judgment of January 8th, 1945 as a mere repetition. See *Sosa v. Royal Bank of Canada*, 134 F. (2d) 955 (C. C. A. 1st, 1943) *supra*. *Crumph v. Hill*, 104 F. (2d) 36 (C. C. A. 5th, 1939) *infra*.

POINT IV.

Whatever constitutes the order of the District Court dismissing the complaint, the notice of appeal filed by the appellant is a satisfactory notice of appeal therefrom.

An appeal is taken by filing a notice of appeal (Rule 73(a)).

Rule 73(b) provides that "the notice of appeal * * * shall designate the judgment or part thereof appealed from". This, of course, has to be construed in the light

of Rule 1, which reads that "they (these rules) shall be construed to secure the just, speedy and inexpensive determination of every action".

The judgment in the instant case, from which the appellant appeals, is the judgment granting the motion to dismiss and dismissing the complaint. The notice of appeal expressly designates that judgment as being the judgment appealed from.

The notice of appeal states that appellant "hereby appeals * * * from that part of the order of the above entitled Court * * * dated the 17th day of November, 1944 * * * which (a) grants the motion of the defendant Federal Reserve Bank of San Francisco to dismiss, and (b) grants the motion of the defendant Henry F. Grady to dismiss and (c) dismisses said action as against said defendant".

In the view of the Reserve Bank, as shown by its memorandum on this motion, the vital and the only appealable judgment of the District Court is not the judgment "which granted the motion to dismiss," but the repetitious judgment that "the complaint is dismissed". *That judgment was appealed from in exact words.* And that judgment was expressly included in the Opinion of November 17, 1945. But, says the Reserve Bank, the Peoples Bank made the great blunder of referring in its notice of appeal to an order of November 17, 1944 when it should have referred to a duplicate order of January 8, 1945; and, so says the Reserve Bank, that was fatal.

It is noteworthy however that Rule 73(b) does not require that the notice of appeal shall *give the date* of the judgment appealed from. The notice must designate the "judgment" appealed from, viz., *what was adjudged or ordered*, not the date thereof, and the rule has been so uniformly construed in all the cases in which this question has arisen. If the judgment appealed from is designated in the notice with sufficient definiteness to inform the appellee as to the substance of what is appealed from, the date referred to is of no consequence—even if it be an erroneous date, or a date which refers to a non-appealable order, or a date of a non-existent order.

The authorities establish the following propositions, among others:

1. That if the judgment of the Court, to wit, its pronouncement or direction, is sufficiently designated, it is not at all necessary in the notice of appeal to give the date thereof (*Crump v. Hill*, 104 F. (2d) 36, *infra* (in that case there was no notice of appeal at all); *Crosby v. Pacific Lines*, 133 F. (2d) 470, and other cases, Hughes, Federal Practice, Vol. 19, p. 48).

2. That if there is a final order from which an appeal could have been taken, and it is reasonably clear that the judgment contained in this final order is what the appellant is attacking on his appeal, the appeal will not be dismissed even though the notice of appeal specifically refers by date and description to a non-appealable order, or even to a non-existent order. (*Safeway Stores v. Coe*, 136 F. (2d) 771; *U. S. v. Ellicott*, 223 U. S. 524, 539; *Milton v. U. S.*, 120 F. (2d) 794; *Shannon v. Retail Clerks International P. Assn.*, 128 F. (2d) 553 (in this last case there was no such order in existence as the one designated in the notice of appeal)).

This is the type of situation which the Reserve Bank asserts in its motion exists in this case. We have demonstrated, we believe, that such is not the case, but even if it were, the appeal, under the authorities, would not be dismissed.

3. Rather than have an appellant lose his appeal, where there is a record before the Court on which the merits can be decided, the appeal will not be dismissed, although the appeal is clearly taken from a non-appealable order, and there does not even exist any order or judgment from which an appeal could be taken (*Crosby v. Pacific Lines*, 133 F. (2d) 470, *supra*; *Milton v. U. S.*, 120 F. (2d) 794, *supra*).

In *Martin v. Clarke*, 105 F. (2d) 685 (C. C. A. 7th, 1939), the Court, after quoting Rule 73(b) said: "The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a par-

ticular case; if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment. Secs. 472, 473, 3 A. M. Jur., pp. 168 and 169. Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal."

In that case, the error in the notice was an error in referring to an order which found the issues for the defendant, whereas the judgment of the Court was in fact in favor of the plaintiff.

(1) *Cases in which the notice of appeal did not designate the judgment appealed from by any date.*

In *Crosby v. Pacific Lines, supra*, there was no order granting a motion to dismiss, no order dismissing the complaint and no notice of appeal from any such non-existent order, and of course, *no designated date in the notice of the non-existent order appealed from*, and yet this Court held that the appeal would not be dismissed.

See also,

Crump v. Hill, 104 F. (2d) 36, *infra*.

(2) *Cases in which the notice of appeal specifically referred to a non-appealable order, there being an existing appealable order.*

In *Safeway Stores v. Coe*, 136 F. (2d) 771 (Court of Appeals of the District of Columbia, 1943), the action came before the appellate court on a motion to dismiss the appeal, in a case which came before the District Court on a motion to dismiss the complaint. The motion to dismiss the complaint was sustained and the complaint was dismissed on October 17th, 1941. Thereafter, the plaintiff

filed a motion for a rehearing which was denied on January 17th, 1942. On February 14th, 1942, the plaintiff gave notice of appeal which stated that it "hereby appeals from the judgment of this Court entered on 17th day of January, 1942"—that being the date of the order of denial of the motion for a rehearing. The Court said (136 F. (2d) 771, at 773):

"But the order of that date was one denying a motion for rehearing, and it is settled that no appeal lies from such an order. * * *

"However, treating the appeal as one from the dismissal order of October 17, 1941, as we may, *United States v. Ellicott*, 223 U. S. 524, 539, 32 Sup. Ct. 334, 56 L. Ed. 535, the question presented is whether the filing and consideration of the motion for rehearing suspended the running of time for appeal. If it did, the appeal was timely and the motion to dismiss should be overruled."

The Court held that the motion for a rehearing did not suspend the time, and consequently that the appeal was not timely. There is a very interesting dissenting opinion by Associate Justice Miller on the main question.

In *U. S. v. Ellicott*, 223 U. S. 524, the judgment against the defendant was entered on May 8, 1908. Subsequently a motion for a new trial was entered which was overruled on January 4, 1909. On February 25, 1909, the defendant gave notice of appeal "from the judgment rendered in the above entitled cause on the 4th day of January, 1909". One of the grounds of the motion to dismiss in the Supreme Court was that the appeal taken was from the judgment of January 4, 1909, which "was merely from the order overruling the motion for a new trial"—clearly a non-appealable order. Nevertheless, the Supreme Court held that the motion to dismiss the appeal was "without merit" (223 U. S. 524 at 539).

In *Milton v. U. S.*, 120 F. (2d) 794 (C. C. A. 5th, 1941) *supra*, the notice of appeal gave notice of an appeal from an order denying a motion for a new trial, obviously a non-appealable order. And in that case, no judgment had

actually been entered by the clerk and there had not even been any direction from the Court for the entry of a judgment. Nevertheless, the Circuit Court of Appeals did not dismiss the appeal, but treated it as if it were an appeal from the judgment which should have been entered saying:

“That the appellant has mistakenly appealed from the order overruling the motion for a new trial in this case may be considered purely a technicality” (120 F. (2d) 794 at 796).

In *Shannon v. Retail Clerks International P. Assn.*, 128 F. (2d) 553 (C. C. A. 7th, 1942), *supra*, the District Court made two so-called restraining orders, one dated October 21st, 1941, and the other dated October 24th, 1941. As the Court said (128 F. (2d) 553 at 554):

“The appeal was taken from an order allegedly dated October 20th. As there is no order of that date in the record, and as there were two orders, one, October 24th, modifying, in part at least, the order of October 21st, we are at a loss to know what order is assailed.”

The Court went on to say (128 F. (2d) 553 at 555):

“The failure to correctly describe the order from which the appeal is taken, must be viewed in the light of the fact that although there were seemingly two separate orders, it would be better to describe them as one order, which was modified in part. On this record we would hardly be justified in dismissing the appeal *because an erroneous date of the order is given in the notice of appeal*. The decision of this court in *Rardin v. Messick*, 7 Cir., 78 F. (2d) 643, justifies us in holding that plaintiffs were appealing from the order of October 21st, as modified by the order of October 24th, which order was the only one entered by the court in this cause.”

In *Johnson v. Wilson*, 118 F. (2d) 557 (C. C. A. 9th 1941), *supra*, this Court took cognizance of a notice of appeal that was not in the record at all, not having been

designated therefor by either party, but which had in fact been filed and was timely.

(3) In *Crosby v. Pacific Lines, supra*, and *Milton v. U. S. supra*, the notice of appeal designated a non-appealable order and there was not in existence any appealable order from which an appeal could be taken.

In summary,

1. Viewed as a notice of appeal from the order of November 17, 1944 contained in the opinion, the notice given herein is a complete compliance with the rules.

2. Viewed as a notice of appeal from the Order on Motions of November 17, 1944, it likewise is a complete compliance with the rules, with the date given and with additional language designed to leave this highly critical appellee in no doubt whatsoever that the appellant viewed the complaint as being dismissed, and that the appellant was appealing from that judgment of the District Court.

3. If the order in the Opinion, and the Order on Motions, both dated November 17, 1944, are to be taken together as supplementary parts of one order and as thus constituting the judgment of the District Court, then likewise the notice of appeal is a complete compliance with the rules.

4. If, however, contrary to our view, it should be deemed that the so-called judgment of January 8, 1945, is the only order of the Court which dismisses the complaint, and from which the plaintiff can appeal, then, under the authorities above cited, even in that case, the notice of appeal (which was filed subsequent to the entry of the so-called judgment and was timely, both with respect to the order of November 17, 1944 and to the so-called judgment) is adequate and the appeal will not be dismissed.

It is therefore clear, that, in any event, this appeal was properly taken.

P O I N T V .

An order dismissing a complaint is a final judgment from which an appeal may be taken.

In view of the provisions of the Rules of Civil Procedure quoted above, there would seem to be no question on this point. However, since the Reserve Bank bases its motion on some of the cases hereinafter analyzed, we feel compelled to discuss them.

A.

The decisions of this Court.

It has been squarely held by this Court in the recent case of *Crosby v. Pacific Lines*, 133 F. (2d) 470, (1943) that an appeal may be taken from an "order" dismissing a complaint (a petition in that case). In that case there was, in fact, not even any order granting a motion to dismiss, nor any order dismissing the complaint, nevertheless, this Court upheld the propriety of the appeal on the ground that the "intent to dismiss was clear". In the instant case, the intent to dismiss was clearly expressed by the Court in a categorical statement that "the complaint is dismissed."

From our search, there appear to be seven decisions of this Court that have a direct bearing upon the matter, which we list in the order of their decision:

1. *City and County of San Francisco v. McLaughlin*, 9 F. (2d) 390, decided in 1925;
2. *Johnson v. Horton*, 63 F. (2d) 950, decided in 1933;
3. *Continental National Bank v. National City Bank*, 69 F. (2d) 312, decided in 1934;
4. *Hicks v. Bekins Moving & Storage Co.*, 115 F. (2d) 406, decided in 1940;
5. *Wright v. Gibson*, 128 F. (2d) 865, decided in 1942;

6. *Monarch Brewing Company v. George J. Meyer*, 130 F. (2d) 582, decided in 1942;
7. *Crosby v. Pacific Lines*, 133 F. (2d) 470, decided in 1943.

The Reserve Bank, on this motion, relies on cases numbered 1, 3, 5, and 6, above listed. Counsel for the Reserve Bank, in their brief, did not cite *Johnson v. Horton*, No. 2, above, nor *Hicks v. Bekins Moving & Storage Co.*, No. 4 above, nor *Crosby v. Pacific Lines*, No. 7 above.

Coming now to a consideration of the rule established by these cases.

(1) The principal authority upon which the Reserve Bank relies is *City and County of San Francisco v. McLaughlin*, 9 F. (2d) 390. We respectfully submit that this case is not in point. This case was decided at a time when the old rules were in effect. The present rules were designed, among other things, to abolish the technicalities of the old procedure. Further, the Court's determination did not result in the plaintiff's being thrown entirely out of court. The Court held that the action was still pending.

As was pointed out by the Circuit Court of Appeals for the Second Circuit in *Zadig v. Aetna Insurance Company*, 42 F. (2d) 142, 143 (C. C. A., 1930), *City and County of San Francisco* was a case of "order for judgment", whereas, in the instant case, the Opinion and the Order on Motions (to quote the *Zadig* case) "assumed finally to dispose of the cause *ex proprio vigori*" and "contemplated no further action".

(2) *Johnson v. Horton*, 63 F. (2d) 950, at 952. This case squarely decided that an order dismissing a complaint is a final order from which an appeal may be taken.

(3) *Continental National Bank v. National City Bank*, 62 F. (2d) 312, at 317, is we submit, not in point at all. The case did not involve any question as to whether an order dismissing a complaint was an appealable order or not.

(4) *Hicks v. Bekins Moving and Storage Company*, 115 F. (2d) 406 (1940). This case involved, among other things, the appealability of an order dismissing a case for lack of prosecution entered by the District Court on its own motion. This Court, on appeal, held that: "An order of dismissal is a final judgment from which an appeal will lie".

(5) *Wright v. Gibson*, 128 F. (2d) 865, C. C. A. 9th, 1942. In that case, following the language upon which the counsel for the Reserve Bank relies and quotes in his memo of points, this Court said:

"In this case, there was no motion to dismiss the action and, of course no order granting such a motion, nor any judgment dismissing the action. The action is still pending in the District Court."

To contrast *Wright v. Gibson* with the instant case, we paraphrase the language of the Court in the *Wright* case just quoted, as follows: "*In the instant case, there was a motion to dismiss the action, and there was an order granting such a motion, and there was an express direction of the Court dismissing the action. In the instant case, the action is no longer pending in the District Court.*" This Court, in the *Wright* case, cited *City and County of San Francisco v. McLaughlin*, *supra*, as authority. It did not refer to *Johnson v. Horton*, 63 F. (2d) 950, *supra*, and *Hicks v. Bekins, etc.*, 115 F. (2d) 406, *supra*. Apparently they were not called to the attention of the Court. They were too dissimilar.

(6) In *Monarch Brewing Company v. George J. Meyer Mfg.*, 130 F. (2d) 582, 1942, the defendant made a motion for a summary judgment. Thereafter, the District Court made an order granting the motion, and subsequently entered a judgment that the plaintiff take nothing by its action against the defendant. The plaintiff did not appeal from the original order, but did appeal from the subsequent judgment. The Court held that the appeal was properly taken, inasmuch as on the record the Court felt satisfied

that the original order was not intended to be and was understood by the parties as not intended to be considered as constituting the rendition of a judgment in favor of the defendant. The Court cites *City and County of San Francisco* and *Wright v. Gibson*, but does not cite *Johnson v. Horton* or *Hicks v. Bekins, etc.* The Court in the *Monarch* case was clearly justified, in view of the peculiar language of the order in holding that it was not intended by the Court nor understood by the parties to be its final order. In the instant case, however, the language of the Opinion, which in plain terms dismisses the complaint, the character of the Order on Motions, and the conduct of the parties shows an entirely different point of view with respect to the Courts orders of November 17th, 1944. The statement of the Court that an order granting a motion to dismiss cannot be appealed from is, we submit, not authority for dismissing an appeal where, as in the instant case, the Opinion expressly dismissed the complaint. The actual decision of the Court was that the appeal taken was a proper appeal.

(7) *Crosby v. Pacific Lines*, 133 F. (2d) 470. That case arose on a petition of the appellant for the allowance of a commission. The matter went to a Special Master, who found that the appellant did not produce the prospective purchaser and he "recommended dismissal of appellant's petition". The order of the Court below from which an appeal was taken "Ordered that the objections to the certificate and report of the Special Master * * * are overruled, and the Certificate and Report of the Special Master is approved".

The Court said (133 F. (2d) 470, at 473):

"Technically speaking, the appeal herein is invalid because there was no order dismissing the petition. However, the intent to dismiss is clear. Under such circumstances we treat the order above recited as one containing an error 'arising from oversight or omission' within the meaning of Federal Rules of Civil Procedure, rule 60(a), 28 U. S. C. A., following section 723c, which, thereunder, may be corrected at any time. It would be mere form for us to remand the case so that the amendment might be made, and therefore we shall consider the order as amended.

Compare: *Norton v. Larney*, 266 U. S. 511, 516, 45 Sup. Ct. 145, 69 L. Ed. 413; *Realty Holding Co. v. Donaldson*, 268 U. S. 398, 400, 45 Sup. Ct. 521, 69 L. Ed. 1014.”

It is, of course, clear that the *Crosby* case did not arise on a motion to dismiss the complaint, but, on the question of the regularity of the appeal, that distinction, we submit, is unimportant. The rules of Civil Practice make no distinction between types of involuntary dismissal. Rule 41(b), Rule 58, and Rule 73(a) and (b).

In the *Crosby* case, what was appealed from was an *order*. There was no judgment following the order. The order was treated as being the final judgment. Furthermore, there had been: (1) no motion to dismiss the petition and (2) no determination of the court that it should be dismissed, and (3) no order made granting the motion for its dismissal, and (4) no statement that “the petition is dismissed” either in the opinion as here, or in any order, and (5) not even a notice of appeal from any such non-existent order. Yet the Court held that the appeal was properly before it, as if on an appeal from an order of dismissal. This Court regarded the *intent* as the dominating consideration. It said: “However, the intent to dismiss is clear.” This Court gave weight to the substance of the situation, not to mere useless words or forms or shadow-boxing.

From this analysis of the cases in this Court, it appears to be finally established by the *Crosby* case that an appeal can properly be taken from an order dismissing a complaint. The *Crosby* case is in accordance with the Court’s decision in *Johnson v. Horton*, *supra*, and in *Hicks v. Bekins, etc.*, *supra*. The expression in the *Monarch Brewing Company* case and in *Wright v. Gibson*, based on the old *San Francisco* case, must, we submit, be limited to the facts in those cases.

See also, *Bensen v. U. S.*, 93 F. (2d) 749 (C. C. A. 9th, 1937).

B.

The Decisions in the Other Circuits.

The decision of this Court in the *Crosby* case is in accord with the rule laid down in the other circuits, as follows:

1. *In the First Circuit.* *Sosa v. The Royal Bank of Canada*, 134 F. (2d) 955 (1943).

2. *In the Second Circuit.* In *Musher Foundation v. Arbitrating Company*, 127 F. (2d) 9 (C. C. A. 2d, 1942). *Zalkind v. Scheinman*, 139 F. (2d) 895 (1943); *Clarke v. Chase Bank*, 137 F. (2d) 797 (1943); *Collins v. Metro-Goldwyn Corp.*, 106 F. (2d) 83 (1939). *Zadig v. Aetna Ins. Co.*, 42 F. (2d) 142 (1930).

3. *In the Third Circuit.* *Baird v. Peoples Bank*, 120 F. (2d) 1001 (1941).

4. *In the Fourth Circuit.* *Bailey v. Crump*, 41 F. (2d) 733 (1930).

5. *In the Fifth Circuit.* *Martin v. Casualty Insurance Company*, 138 F. (2d) 896 (1943).

6. *In the Sixth Circuit.* *Atwood v. National Bank of Lima*, 115 F. (2d) 861 (C. C. A. 6, 1940).

7. *In the Seventh Circuit.* *Karl Kiefer Manufacturing Company v. U. S. Bottlers Machinery Company*, 108 F. (2d) 469 (C. C. A. 7th, 1939). Also, *Jefferson Electric Co. v. Sola Co.*, 122 F. (2d) 124 (1941).

8. *In the Eighth Circuit.* *Iowa-Nebraska Light Company v. Daniels*, 63 F. (2d) 322 (C. C. A. 8th, 1933), *semble*.

9. *In the Ninth Circuit.* This circuit—*Johnson v. Horton*, 63 F. (2d) 950 (1933); *Hicks v. Bekins*, 115 F. (2d) 406 (1940); *Crosby v. Pacific Lines*, 133 F. (2d) 470 (1943).

10. *In the Tenth Circuit.* *Western Union Telegraph Co. v. Dismang*, 106 F. (2d) 362 (C. C. A. 10th, 1939).

11. *In the District of Columbia. Vietti v. Wayne*, 136 F. (2d) 771 (U. S. Court of Appeals for the District of Columbia, 1943). *Safeway Stores v. Coe*, 136 F. (2d) 771 (1943).

In 10 Cyc. of Federal Procedure, 2d Edition, page 262, it is stated that “The general rule is that an order dismissing the complaint is a final and appealable decree, though it may leave the merits undetermined and may not be a bar to another action”.

* * *

In addition to the cases in this Court, upon which the Reserve Bank relies in support of its motion, it cites, at page 2 of its Memorandum of Points and Authorities, four cases in other jurisdictions.

These cases are, we submit, not in point. *Schendel v. McGee*, 300 Fed. 273 (C. C. A. 8th, 1924), merely held that an order of the Court dismissing the case from the calendar and striking it from the docket was not an appealable order, and consequently the appropriate remedy for the plaintiff was a mandamus to have the case restored to the calendar, which mandamus was granted. See *Zadig v. Aetna Ins. Co.*, *supra*, to the contra.

Amsinck & Co. v. Springfield Grocer Company, 7 F. (2d) 855 (C. C. A. 8th, 1925), held that the Court was not barred from reopening the case to receive new evidence in view of the passing of the term, inasmuch as, in the view of the Court, the memorandum opinion of the District Court which ended with the words “Judgment accordingly” had not been followed by any order of the Court or by any judgment thereon, although the same was copied into the record containing judgments.

In *Dyar v. McCandless*, 33 F. (2d) 578 (C. C. A. 8th, 1929), the appeal was taken from an order striking out an answer but the order gave the defendant leave to amend. The opinion contains a dictum to the effect that an order granting a motion to dismiss a complaint, without entry of judgment, is not a final order. But the case itself does not

stand for that proposition and it was decided under the old rules.

In *Leonard v. Socony Vacuum Oil Company*, 130 F. (2d) 535 (C. C. A. 7th, 1942), it was held that a partial summary judgment for the defendant was not appealable, the Court saying "Despite such interlocutory orders, the suit or action is regarded as still pending and before the Court for final determination by final judgment before jurisdiction can be conferred upon this Court to review * * *".

POINT VI.

If the "Order on Motions" of November 17, 1944 should be deemed to be the order appealed from, it is not important that the order does not contain the words "the complaint is dismissed", particularly since the opinion of the District Court contains that very determination and directs that the order shall be in accordance therewith.

In the *Crosby* case, 133 F. (2d) 470, *supra*, there was merely a "recommendation" of the Special Master, that the petition be dismissed. No motion had been made in the District Court to dismiss the petition, no opinion to the effect that it should be dismissed had been rendered, no order granting any motion to dismiss had been made, and no order or judgment had been made dismissing the petition and no appeal from any such order had been taken. Nevertheless, *and this is the crucial fact*, as this Court said "However, the intent to dismiss is clear". In the instant case, the matter was before the District Court on a motion to dismiss the complaint. The opinion of the Court not only stated that "the motions to dismiss filed by each of the defendants will be granted" but actually stated in the present tense that "Therefore, this complaint is dismissed as to all defendants * * *" (R., p. 165) and the Court directed that "an order will be entered in accordance with this opinion." An actual order was so entered, except that it failed to be in accordance with the opinion in that it failed

to contain the words "and the complaint is dismissed". The notice of appeal of the Peoples Bank nevertheless stated that an appeal was taken from that part of the order which "dismisses said action as against said defendant" (R., p. 166).

Can anyone doubt that the complaint which had already been categorically dismissed by the order in the Opinion was also quite thoroughly dismissed by the "Order on Motions". To use the language of this Court in the *Crosby* case "the intent to dismiss is clear". Surely, nothing can turn on the fact that the Order on Motions was not in conformity with the direction of the Opinion, and consequently does not contain the words "and the complaint is hereby dismissed". Those words, in reality, add nothing to the words "the motions to dismiss * * * are therefore granted". What is it that is granted? The dismissal of the complaint. The addition of the words "and the complaint is dismissed" would be mere superfluous repetition. We cannot believe that in this enlightened age and under the liberal rules now in force, and in view of the non-technical approach to such matters which this Court has adopted in the *Crosby* and other cases, the failure of the Order on Motions of the District Court to comply with the Opinion of that Court by the addition of the repetitious words "the complaint is dismissed" will be treated as of any consequence whatsoever.

As above stated, we do not deem the addition of these words as adding anything to the Order on Motions or as in any way necessary in view of the order in the Opinion which actually dismisses the complaint. We do not believe that the addition of these words would make the Order on Motions any more final and effective in dismissing the complaint than that order already is, if, in view of the rules, that should be deemed the order in the case. But purely out of superabundant caution and in view of the hyper-technical attitude of the Reserve Bank in this situation, we applied to the District Court for an order under Rule 60A directing what seemed to be the purely ministerial act of bringing the Order on Motions of November 17th, 1944 into

“accordance” with the opinion by adding the words copied from the opinion, “and the complaint is dismissed”.

We believe that, *as a matter of course*, the District Court should have granted the motion of the plaintiff Peoples Bank, made on April 26, 1945, to correct the Order on Motions, because of an error arising from a plain clerical “oversight or omission” (Rule 60A). In our judgment, there could scarcely be a plainer case for the correction of an obvious error of omission. We are unable to understand why the District Court refused to make the correction. The opinion of the Court stated in so many words that “the complaint is dismissed.” It said that an order would be entered “in accordance with this opinion”. The order entered was not in strict literal accordance with the opinion.

Under the decision of the Court in the *Crosby* case, the Order on Motions should have been amended as a matter of course, *and following its procedure in that case, this Court will, we believe, if it deems the omission as of any substance, treat the order of November 17, 1944, as if, in fact, the obvious clerical omission had been corrected.* The amendment which in the *Crosby* case this Court treated as having been made by the District Court in order to technically regularize the appeal, was of far greater magnitude than would be involved in the addition in the instant case to the Order on Motions of the repetitious words “and the complaint is dismissed”.

In *Johnson v. Wilson*, 118 F. (2d) 557 (C. C. A. 9th, 1941) *supra* the appellee made a motion to dismiss the appeal because in the record on appeal the only notice of appeal from a judgment of May 10, 1931, was a notice of June 6th, 1940. Nevertheless, there had been in fact an earlier and timely notice of appeal. The Court said (118 F. (2d) 557, at 558) :

“Quite likely the reason for this omission is because the record was not finally agreed upon by the parties until June 6, 1940—that is after an elapse of time in excess of that allowable by the district judge for the filing here of the transcript of the record on the earlier notice of appeal.

“However, since this court has the power to consider the appeal though the filing of the record came after the time allowable by the district court, (*Ainsworth v. Gill Glass & Fixture Co.*, 3 Cir., 104 F. 2d 83, 84), the clerk should have included the notice of appeal of December 19, 1939, and left to our discretion the disposition of the appeal. Since the record presents a strongly arguable claim of error and the delay is not shown to have prejudiced the appellee, we consider the appeal of December 19, 1939, on the judgment of May 10, 1939. The motion to dismiss the appeal is denied.”

See *Odell v. Batterman & Co.*, 223 Fed. 292, 295 (C. C. A. 2nd, 1915).

Courts no longer take a formalistic view with respect to appeals. The substance is dealt with.

The clear purpose of this Court, as evidenced in the *Crosby* case, and in *Johnson v. Wilson*, *supra*, not to permit an appellant to lose his appeal on unsubstantial grounds, where the reality of a final decision exists, and the intent to appeal therefrom is clear, and there is an adequate record before the Court and the appellee is adequately notified thereof, is in accordance with the attitude uniformly adopted by other Circuit Courts of Appeal in parallel situations.

In *Crump v. Hill*, 104 F. (2d) 36 (C. C. A. 5th, 1939), no notice of appeal of any kind was filed. The rules were not complied with in any respect. A totally novel procedure was adopted, to wit, a waiver of the notice of appeal signed by appellant and appellee and cooperation by both of them in the preparation of the record. The rules have no provision of any kind for waiver of notice of appeal, and yet the propriety of the appeal was sustained.

The Court said (104 F. (2d) 36, at 38):

“* * * It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure

required by the Rule itself is a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.

“If the appellant had not by filing his notice of appeal in February, when too late to be effective, called attention to the technical point now urged, we think it would hardly have occurred to appellee or to anyone else that what appellee and appellant did to perfect the appeal had not been effective to do so. The ill-advised late filing of that notice can have no effect upon the jurisdiction of this Court already established by the prior proceedings. It must be disregarded, as surplusage, its filing as a superfluous act.

“Long before its filing and well within the time fixed by the Rules, appellant, in complete accordance with their spirit and in substantial accordance with their letter, had filed with the Clerk a complete equivalent of a notice of appeal, appellee’s waiver of service of such notice and of designation of record contents, and her appearance to the appeal. By Rule 1 it is provided that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action, and by Rule 61 that the Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

“We think that it was substantial compliance with the letter of Rule 73 to file, instead of the notice of appeal, the waiver of service thereof and appearance thereto, but if this ruling does violate its letter, it certainly accords with and gives effect to its substance and spirit. Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee’s motion seeks.”

In the instant case, instead of a waiver of notice, notices of appeal were given by both appellant and appellees from the “order of November 17, 1944” (a fact certainly of equal weight with a waiver), and we have a cooperation in preparation of the record on appeal similar to that in the *Crump* case.

Another strong case is *Milton v. United States*, 120 F. (2d) 794, *supra*, in which the appeal was taken from a non-

appealable order and there was no appealable order in existence.

See also, *Safeway Stores v. Coe*, 136 F. (2d) 711, *supra*, *U. S. v. Ellicott*, 223 U. S. 524, *supra*, *Shannon v. Retail Clerks, etc.*, 128 F. (2) 553, *supra*.

In *State of Missouri v. Todd*, 122 F. (2d) 804 (C. C. A. 8th, 1941) the appeal was taken from an order denying a petition of State of Missouri for a rehearing on the Commission's petition for review of the bankruptcy referee order allowing petitioner's claim in part. The court held that the order denying appellant's petition for rehearing was not an appealable order but went on to hold that if the appellant had appealed from that order and from the order confirming the order of the referee, a different situation would have been presented. In other words, it held in effect that a mere order confirming an order of the referee allowing a claim was an appealable order although no judgment had been entered for the payment of the money involved.

See also *Charles D. Leffler*, 100 F. (2d) 759 (C. C. A. 3rd, 1938), where the Circuit Court of Appeals sustained the action of the District Court in amending a notice of appeal after appeal had been perfected, by including in the notice of appeal the name of an appellee theretofore omitted therefrom.

In conclusion, the motion to dismiss the appeal should be denied.

Respectfully submitted,

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May 21, 1945.

No. 11005

United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF TUCSON, a Municipal Corporation,
Appellant,
vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the District of Arizona

FILED

MAY 3 - 1945

PAUL P. O'BRIEN,
- CLERK

No. 11002

United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Bond on	46
Certificate of Clerk to Transcript of Record on	51
Notice of	45
Statement of Points Upon Which Appellant Intends to Rely, and Designation of Record on (CCA)	53
Statement of Points Upon Which Appellant Intends to Rely on (DC).....	48
Stipulation re Record on	49
Bond for Removal to District Court of the United States of America	27
Bond on Appeal	46
Certificate of Clerk to Transcript of Record on Appeal	51
Complaint	2
Docket Entries	44
Judgment Dismissing Action on Motion and Amended Motion to Dismiss	43

Index	Page
Minute Entries:	
Feb. 1, 1944—Hearing on Motion to Dismiss	34
Mar. 6, 1944, Mar. 9, 1944, April 3, 1944—Further Hearing on Motion to Dismiss	35, 39
Sept. 1, 1944, Sept. 5, 1944, Sept. 6, 1944—Further Hearing on Motion and Amended Motion to Dismiss	40, 41
Sept. 8, 1944 — Granting Motion and Amended Motion to Dismiss	42
Motion to Dismiss	32
Amendment Thereto	36
Additional Memorandum of Points and Authorities in Support of.....	37
Additional Memorandum of Authorities in Support of, and Amendment of Said Motion	38
Names and Addresses of Attorneys of Record	1
Notice of Appeal	45
Notice of Filing Petition and Bond.....	22
Notice of Removal	31
Order Accepting Petition and Bond, and Removing Cause to District Court.....	30
Petition for Removal to the District Court of the United States	24

Index	Page
Statement of Points and Designation for Printing Record on Appeal (CCA).....	53
Statement of Points Upon Which Appellant Intends to Rely on Appeal (DC)	48
Stipulation as to Record on Appeal.....	49
Summons	20

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In the Superior Court of the State of Arizona
In and For the County of Pima

No. 24185

CITY OF TUCSON, a Municipal Corporation,
Plaintiff,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a corporation,
Defendant.

COMPLAINT

Plaintiff alleges:

I.

That the plaintiff, the City of Tucson, is a municipal corporation, duly organized and existing under its Charter and the Constitution and laws of the State of Arizona, and located within the County of Pima, State of Arizona. That the defendant, The Tucson Gas, Electric Light and Power Company, is a corporation duly organized and existing under the laws of the State of Colorado, and is duly authorized to, and is, transacting business within the State of Arizona and County of Pima.

II.

That said defendant is engaged in the business of generating, distributing and supplying electric light and power, and natural and artificial gas to the City of Tucson and its inhabitants, as well as to consumers located outside of the City of Tucson and within the State of Arizona.

III.

That said defendant is the owner of property located in the City of Tucson, Pima County, Arizona, as well as property located outside the City of Tucson and within the State of Arizona, and has certain interests under franchises and contracts for the purchase, sale and distribution of electricity and gas with other corporations, which property and interests in property are hereinafter more particularly described. That all of said property and interests in property is devoted to a public use and is used or useful by the defendant in supplying electricity and natural and artificial gas to said City of Tucson and its inhabitants and to said consumers located outside of the City of Tucson and within the State of Arizona. That said property and interests in property are described as follows:

All and singular the premises, property, assets, rights and franchises of defendant of whatever character, including, among other things, all right, title and interest of defendant in and to all plants for the generation of electricity by water, steam or other power; all power houses, gas plants, gas holders, substations, transmission lines, distributing systems; all offices, buildings and structures, and the equipment thereof; all machinery, engines, boilers, dynamos, machines, regulators, meters, transformers, generators and motors; all appliances whether electrical, gas or mechanical, conduits, cables and lines; all mains and pipes, service pipes, fittings, valves and connections, poles, wires, tools,

implements, apparatus, furniture, and chattels; all municipal franchises and other franchises; all line for the transmission and distribution of electric current, or gas including towers, poles, wires, cables, pipes, conduits, street lighting systems and all apparatus for use in connection therewith; all real estate, lands, leaseholds; all easements, servitudes, licenses, permits, rights, powers, franchises, privileges, rights of way and other rights in or relating to real estate or the occupancy of the same and all [4] the right, title and interest of defendant in and to all other property of any kind or nature appertaining to or used or occupied or enjoyed in connection with any property hereinbefore described; all contracts for the purchase or sale of electricity or gas; all leases and operating agreements; and fuels, materials, stores and supplies; together with all and singular the tenements, hereditaments and appurtenances belonging or in any wise appertaining to the aforesaid premises, property, assets, rights and franchises or any part thereof, with the reversion and reversions, remainder and remainders, and all the estate, right, title and interest and claim whatsoever, at law as well as in equity, which defendant now has or may hereafter acquire in and to the aforesaid premises, property, assets, rights and franchises and every part and parcel thereof, excepting, however, from the properties made the subject of this complaint, all bills, notes and accounts receivable, cash on hand or in bank, shares of stock and other certificates or evidences of interest therein, and all bonds, notes

and other evidences of indebtedness or certificates of interest therein and other securities owned by defendant, and defendant's franchise to be a corporation. Said property and interests in property, belonging to the defendant, and so sought to be condemned, specifically includes, but is not limited to, the following:

FIRST PART

(Plants)

The following electric generating plants, gas generating plant, gas holders, steam plant, gas regulating stations, substations and other properties of the Company, including all power houses, transmission lines, buildings, pipes, structures and works, and the lands of the Company on which the same are situated, and all the Company's lands, easements, rights, rights-of-way, water rights, rights to the use of water, including all the Company's right, title and interest in and to any and all decrees therefor, permits, franchises, consents, privileges, licenses, poles, towers, wires, switch racks insulators, pipes, machinery, engines, boilers, motors, automobiles, trucks, office furniture and fixtures, regulators, meters, tools, applicances, equipment, appurtenances and supplies, forming a part of or appertaining to said plants, holders, sites, stations or other properties, or any of them, or used or enjoyed, or capable of being used or enjoyed in conjunction or connection therewith, all situated in the State of Arizona, more particularly described as follows:

PIMA COUNTY

1. Tucson Power Plant and Gas Plant

All of Lots 1, 2, 3, 4, 5, and 6 in Block 171 of the City of Tucson, Pima County, Arizona, according to the survey, field notes and map made by S. W. Foreman and approved by the Mayor and Common Council on June 26, 1872, a copy of which map is of record in the office of the County Recorder of Pima County, Arizona, in Book 3 of Maps and Plats at page 70 thereof, except that portion lying northerly or easterly of the southwesterly line of the right of way of the Southern Pacific Railroad Company as the same passes through said Block.

That piece or parcel of land formerly constituting a part of North Meyer Street in the City of Tucson, lying between the west line of Block 171, and the east line of Block 172, and between the south line of West Fifth Street and the north line of West Sixth Street, all of which was vacated as a public street by ordinance No. 636 of the Ordinances of the Mayor and Council of the City of Tucson.

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of Lot 1 in Block 172 of the City of Tucson, Pima County, Arizona, according to the map of Subdivision of Lot 1, Block 172, of record, in the office of the County Recorder of Pima County, Arizona, in Book 1 of Maps and Plats at page 10 thereof.

2. Cortaro Power Plant

That portion of the northwest quarter of the southeast quarter of Section 26, Township 12 South,

Range 12 East of the G & S R B & M, Pima County, Arizona, more particularly described as follows:

[5]

Beginning at a point in the south line of said northwest quarter of the southeast quarter of Section 26, which point is 1051.7 feet Easterly from the southwest corner of said northwest quarter of the southeast quarter of Section 26; thence West-erly along the said south line of the northwest quar-ter of the southeast quarter of Section 26 a distance of 553.5 feet to a point; thence Northerly 498.2 feet from and parallel to the west line of the said North-west quarter of the Southeast quarter of Section 26 a distance of 320.1 feet to a point; thence Easterly 320.1 feet from and parallel to the south line of the said Northwest quarter of the Southeast quarter of Section 26 a distance of 262.8 feet to a point on the Southwest right-of-way line of the Cortaro Water Company's Cortaro Canal, which right-of-way line is 185 feet southwesterly from and parallel to the center line of the main line tract of the Southern Pacific Railroad; thence Southeasterly along said canal right-of-way line a distance of 431.9 feet to the point of beginning, containing 3 acres, more or less.

PART SECOND

(Substations)

The following electric substations and substation sites of the Company, including all buildings, struc-tures, towers, poles, lines, and all equipment, appli-cances and devices for transforming, converting and

distributing electric energy, and all the right, title and interest of the Company in and to the land on which the same are situated, and all of the Company's lands, easements, rights-of-way, rights, franchises, privileges, machinery, equipment, appliances, devices, appurtenances and supplies forming a part of said substations or any of them, or used or enjoyed, or capable of being used or enjoyed, in conjunction or connection with any thereof, all situated in the State of Arizona, more particularly described as follows:

PIMA COUNTY

1. New Sawtelle Substation (Tucson)

The East Half of Lot 14 D Pastime Acres Resubdivision, Pima County, Arizona, according to the map or plat thereof, of record in the office of the County Recorder of Pima County, Arizona, in Book 5 of Maps and Plats at page 37 thereof.

2. 36th Street Substation (Tucson)

All of Lot 8, in Block 28 of Grand View Addition to the City of Tucson, Pima County, Arizona, according to the map and plat of said addition of record in the office of the County Recorder of Pima County, Arizona, in Book 2 of Maps and Plats at page 39 thereof.

3. Grant Substation (Tucson)

Lots One (1) and Four (4) of the Resubdivision of the East Half (E $\frac{1}{2}$) of Lots Two (2) and Three (3) in Block One (1) of Sierra Vista Subdivision, in Pima County, Arizona, a map of said Resubdivision being of record in the office of the County

Recorder of Pima County, Arizona, in Book 6 of Maps and Plats, at page 53 thereof.

PART THIRD

(Miscellaneous Property)

The following warehouses, buildings, structures, works and sites and the Company's lands on which the same are situated, and all easements, rights, rights-of-way, permits, franchises, consents, privileges, licenses, machinery, [6] equipment, furniture and fixtures, appurtenances and supplies forming a part of said warehouses, buildings, structures, works and sites, or any of them, or used or enjoyed or capable of being used or enjoyed in connection or conjunction therewith, situated in the State of Arizona, more particularly described as follows:

PIMA COUNTY

1. Tucson Warehouse and Loading Platform

All that part of Lot 7 in Block 56 of the City of Tucson, Pima County, Arizona, according to the official field notes, map and survey made and executed by S. W. Foreman and approved and adopted by the Mayor and Common Council of said City (then Village) of Tucson, on June 26, 1872, a copy of which map is of record in the office of the County Recorder of Pima County, Arizona, in Book 3 of Maps and Plats at page 70 thereof, South of Right-of-Way of Southern Pacific Railroad.

Also all those parts of Lots 10 and 11 in said Block 56 described as follows, to wit:

Beginning at the southwest corner of said Lot 11; run thence north along the west line of said Block 56 for a distance of 132 feet to the northwest corner of Lot 10; thence east along the north line of Lot 10, a distance of 60 feet; thence south, parallel with the west line of said Block a distance of 132 feet to a point on the south line of said Lot 11; run thence westerly along the south line of said Lot 11, a distance of 60 feet more or less to the place of beginning.

2. Tucson Regulating and Metering Station

All that part of the southwest quarter of Section 34, Township 14 South of Range 14 East, G & S R B Q M, Pima County, Arizona, more particularly described as follows, to wit:

Commencing at the corner common to Sections 33 and 34 and 3 and 4, Townships 14 and 15, South of Range 14 East, G & S R B & M, Pima County, Arizona, run thence S. $90^{\circ} 41'$, 404 feet to the point of intersection of the southerly prolongation of the east line of Pima County Highway No. 295 and the south line of Section 34, Township 14 South of Range 14 East; run thence N. $1^{\circ} 0' W.$, along the east line of said right-of-way for a distance of 683.6 feet to the point of intersection of the South line of the Western Gas Company easement as more fully appears of record in the office of the County Recorder of Pima County, Arizona, in Book 51 of Miscellaneous Records, page 21, and the east right-of-way line of said Pima County Highway No. 295, which point is the true point of beginning;

run thence N. 1° W., along the said east right-of-way line of said road, a distance of 218 feet to a point; run thence south $74^{\circ} 13'$ E., on a line parallel with the south line of said Western Gas Company easement, for a distance of 208.71 feet to a point; run thence S. 1° E., parallel with the east line of said Pima County Highway No. 295, for a distance of 218 feet to a point on the south line of said Western Gas Company easement; run thence N. $74^{\circ} 13'$ W., along the south line of said Western Gas Company easement for a distance of 208.71 feet to the point of beginning.

PART FOURTH

(Gas Distribution System)

The gas distribution system of the Company, including all pipes, [7] pipe lines, motors, gas boosters, regulators, meters and appurtenances, appliances, devices and equipment, all the Company's other property, real, personal or mixed, forming a part of, or used, occupied or enjoyed in connection with or in any way appertaining to said distribution system, together with all of the company's rights-of-way, easements, permits, privileges, municipal or other franchises, licenses, consents and rights for or relating to the construction, maintenance or operation thereof through, over, under or upon any public streets or highways, or public or private lands situated in the County of Pima, State of Arizona, more particularly described as follows:

That certain gas distribution system as located,

constructed and equipped, together with all franchises, permits and consents under which said system is or may be operated in or adjacent to the City of Tucson, in the County of Pima.

And also all branches, extensions, improvements and developments of or appertaining to or connected with said gas distribution system, and all other gas distribution systems of the Company and parts thereof wherever situated, whether connected or not connected with the foregoing distribution system, whether for the distribution of manufactured or natural gas, and whether now owned or hereafter acquired, as well as all rights-of-way, easements, privileges, permits, municipal or other franchises, consents and rights for, or relating to the construction, maintenance or operation thereof, or any part thereof, through, over, under or upon public or private lands, whether now owned or hereafter acquired.

PART FIFTH

(Electric Distribution System)

The following electric distribution systems of the Company, including towers, poles, wires, insulators, appliances, devices, appurtenances and equipment, and all the Company's other property, real, personal or mixed, forming a part of, or used, occupied or enjoyed in connection with or in any way appertaining to said distribution systems, or any of them together with all of the Company's rights-of-way, easements, permits, privileges, municipal or other franchises, licenses, consents and

rights for or relating to the construction, maintenance or operation thereof through, over, under or upon any public streets or highways, or public or private lands situated in the County of Pima, State of Arizona, more particularly described as follows:

That certain electric distribution system as located, constructed and equipped, together with all franchises, permits and consents under which said system is or may be operated in, or in the vicinity of, the City of Tucson, in the County of Pima; except, however, all ornamental standards or brackets now owned by the Company and forming a part of the street lighting system in the City of Tucson, in the County of Pima.

That certain electric distribution system as located, constructed and equipped, together with all franchises, permits and consents under which said system is or may be operated in or adjacent to the village of Marana, in the County of Pima.

And also all branches, extensions, improvements and developments of or appertaining to or connected with said electric distribution systems, or any of them, and all other electric distribution systems of the Company and parts thereof wherever situated, and whether now owned or hereafter acquired, as well as all rights-of-way, easements, privileges, permits, municipal or other franchises, consents and rights for or relating to the constructions, maintenance or operation thereof, or any part thereof, through, over, under or upon public or private lands, whether now owned or hereafter acquired. [8]

PART SIXTH

(Electric Transmission and Distribution Lines)

The following electric transmission and/or distribution lines of the Company, including the towers, poles, pole lines, wires, switch racks, insulators, supports, guys, telephone and telegraph lines and other appliances and equipment, and all other property of the Company, real, personal or mixed, forming a part thereof or appertaining thereto, together with all of the Company's rights-of-way, easements, permits, privileges, municipal or other franchises, consents, licenses and rights, for or relating to the construction, maintenance or operation thereof, through, over, under or upon any public streets or highways or other lands, public or private, all situated in the State of Arizona and the Counties of Pima and Santa Cruz, more particularly described as follows:

That certain 45,000-volt, Three Phase, single circuit wood pole transmission line known as the Tucson-Nogales transmission line extending from the Tucson Plant of the Company in Tucson, Pima County, southerly to the northern boundary of the City of Nogales, Santa Cruz County, a distance of approximately 67 miles, all as/located, constructed and equipped in the Counties of Pima and Santa Cruz, State of Arizona; and all distribution and branch lines therefrom and thereof in the County of Pima.

Also all extensions, branches, taps, developments and improvements of or to any and all of the above

described transmission and/or distribution lines, telephone and telegraph lines or any of them, as well as all rights-of-way, easements, permits, privileges, rights and municipal or other franchises, licenses and consents, for or relating to the constructions, maintenance or operation of said lines or any of them, or any part thereof, under or upon any public streets or highways or any public or private lands, whether now owned or hereafter acquired.

PART SEVENTH

1. That certain tract of land described as lots 2 and 3 of the resubdivision of the east one-half of lots 2 and 3 in block 1 of Sierra Vista Subdivision in Pima County, Arizona, a map of said resubdivision being of record in the office of the County Recorder of Pima County in Book 6 of Maps and Plats at page 53 thereof.

2. That certain tract of land described as that certain part of the northwest one-quarter of the southeast one-quarter of Section 20, township 13 South, Range 14 East, G. & S. R. B. & M., Pima County, Arizona, described more particularly as follows, to wit: Beginning at a point 123.8 feet south of the quarter section corner of said Section 20 at the point of intersection of the south boundary of the right of way of River Road, a Pima County highway, and the west boundary line of the northwest one-quarter of the southeast one-quarter of said Section 20, run thence in a southerly direction along said west boundary line thirty feet to a point,

run thence in an easterly direction parallel to the north boundary line of said southeast one-quarter of Section 20, thirty feet to a point, run thence northerly parallel to the west boundary line of said southeast one-quarter of Section 20 to a point on the south boundary line of said River Road, run thence in a westerly direction along the south boundary line of River Road to the place of beginning.

3. That certain gas transmission line and distribution system, located in the counties of Pima and Pinal, State of Arizona, and serving the Marana Airport, together with all franchises, permits, easements and consents under which said line and system is operated.

4. The following electric transmission and distribution lines of the Company, including the towers, poles, pole lines, wires, switch racks, [9] insulators, supports, guys, telephone and telegraph lines and other appliances and equipment, and all other property of the Company, real, personal and mixed, forming a part thereof or appertaining thereto, together with all of the Company's rights of way, easements, permits, privileges, franchises, licenses, and rights pertaining thereto, all situated in the State of Arizona, and the Counties of Pima, Pinal, Santa Cruz and Cochise, more particularly described as follows: those certain transmission lines and distribution systems serving Fort Huachuca, Consolidated-Vultee Aircraft Corporation, Marana Airport, Ryan Air School, and Davis-Monthan Field.

IV.

That so far as the plaintiff can determine, the defendant is the sole owner of and claimant to the above described property and interests in property; upon information and belief, that The Chase National Bank of the City of New York, New York, *New York*, a corporation, claims some lien against part or all of the above described property and interests in property by virtue of a certain Indenture bearing date as of April 1, 1941, and recorded in the office of the County Recorder of Pima County, Arizona, in Book 149 of Realty Mortgages at page 1, and following.

That by the terms and provisions of the Charter under which the plaintiff is organized and existing the plaintiff is authorized to acquire by purchase, condemnation or otherwise, and to establish, maintain, equip, own and operate works and appliances within and without the City for supplying the City and its inhabitants and persons, firms and corporations outside the City, including other municipal corporations with water, gas, electric light, heat or power, telephone service, telegraph service, or other works or appliances, for the production or distribution of any public utility services within or without said City. That the plaintiff is also authorized by statute, and particularly by Sections 27-901 and 27-906 A.C.A., 1939, to condemn property of the nature hereinabove described.

V.

That the property sought to be condemned herein is to be used by the plaintiff for the purpose of

supplying electric light and power and natural and artificial gas to the City of Tucson and its inhabitants, as well as to consumers located outside of the City of Tucson and within the State of Arizona, it being intended that after acquiring said property the plaintiff shall use the same for the purposes aforesaid.

VI.

That the property and interests in property above described constitute all of the property of the defendant used or useful for the purpose of supplying and distributing electric light and power and artificial and natural gas to the City of Tucson and its inhabitants and to consumers located outside of the City of Tucson and within the State of Arizona within the area in which the defendant is now operating and supplying such commodities and services.

VII.

That the taking of the above described property and interests in property is for the public use and such taking is necessary for the operation and maintenance of a municipally owned electric light and power utility and for the supplying and distribution of electricity and natural and artificial gas to the City of Tucson and its inhabitants and to consumers located outside of said City and within the State of Arizona and within the area presently served by the defendant.

VIII.

That the above described property is now devoted to a public use and that the public use to

which it is sought to be applied by the plaintiff is a more necessary public use. [10]

IX.

That the plaintiff proposes and intends to finance the acquisition of the above described property, and interests in property pursuant to the provisions of the Municipal Revenue Bond Act of 1943, being Chapter 31 of the Laws of 1943.

X.

That the Mayor and Council of the City of Tucson have duly passed and adopted a resolution which is now in full force and effect, finding and declaring that the above described property and interests in property are necessary to the City of Tucson for the uses hereinabove mentioned, and authorizing and directing the City Attorney to institute an action to condemn said property and interests in property and to acquire title thereto for said uses.

Wherefore, the plaintiff prays judgment:

1. Determining and ascertaining the value of the property and interests in property sought to be condemned.
2. Condemning the estate and interest of the defendant, in and to said property and interests in property.
3. That upon payment by the plaintiff unto the defendant, or to any person who may be determined herein to be entitled thereto, or upon payment into court of the sum of money found in such

judgment to be just compensation for said property and interests in property, the plaintiff do have final judgment of condemnation of said property, vesting title thereto in the plaintiff.

4. For such other and further relief as to this honorable court may appear equitable and just in the premises.

JOHN D. LYONS, JR.,

City Attorney

THOMAS H. McKAY,

Assistant City Attorney

Attorneys for Plaintiff

J. D. LYONS, JR.

Of Counsel

[Endorsed]: Filed Feb. 2, 1944. [11]

[Title of Superior Court and Cause.]

SUMMONS

The State of Arizona to the above named defendant the Tucson Gas, Electric Light and Power Company, a corporation,

You are hereby summoned and required to appear and defend in the above entitled action in the above entitled court, within twenty days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, or within thirty days, exclusive of the day of service, if served without the State of Arizona; and you are

hereby notified that in case you fail so to do, judgment by default will be rendered against you for the relief demanded in the complaint.

The name and address of plaintiff's attorney is John D. Lyons, Jr., City Attorney, 905 Valley National Bldg., Tucson, Arizona.

Given under my hand and the seal of the Superior Court of the State of Arizona in and for the County of Pima, this 12th day of January, 1944.

BELLE D. HALL,

Clerk.

By GRAYCE I. GIBSON,

Deputy Clerk.

[Superior Court Seal]

Office of the Sheriff,

County of Pima, State of Arizona—ss.

I hereby certify that I received the within summons Jan. 14, 1944, and personally served same on the within named The Tucson Gas, Electric Light and Power Company, a corporation, being the defendants named in said summons, by leaving with Max Pooler, manager of the corporation, at 9:30 A. M., Jan. 17, 1944, in the County of Pima a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 17th day of Jan. A. D. 1944.

Fees, service 1.....\$1.500

Copies\$

Travel 1 miles\$.30

Total\$1.80

ED. F. ECHOLS,

Sheriff.

By M. J. VAN VORST,

Deputy Sheriff.

[Endorsed]: Filed Feb. 2, 1944. [12]

[Title of Superior Court and Cause.]

NOTICE

To the above named Plaintiff, and to John D. Lyons, Jr., City Attorney, and Thomas H. McKay, Assistant City Attorney, Attorneys for said Plaintiff:

Please take notice that the defendant, The Tucson Gas, Electric Light and Power Company, a corporation, will on Monday, the 31st day of January, 1944, at 9:30 o'clock in the forenoon of that day, file in the Superior Court of the State of Arizona, in and for the County of Pima, and in the office of the Clerk of said Court, in which Court the said action is now pending, a petition and bond for the removal of said action from the said Superior Court of the State of Arizona, in and for the County of Pima, to the District Court of the United States, for the District of Arizona, and on said 31st day of

January, 1944, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at Courtroom No. 1 of the said Superior Court of the State of Arizona, in and for the County of Pima, in the Court House in the City of Tucson, Pima County, Arizona, said petition and bond will be presented by said defendant to the said Superior Court of the State of Arizona, in and for the County of Pima, and said petition and bond will at that time be called for hearing before the said Superior Court, at which time and place you may be present if you so elect.

Copies of said petition and bond are hereto attached and made a part of this notice.

Dated this 29th day of January, 1944.

DARNELL & ROBERTSON

By GEORGE R. DARNELL,

Attorneys for Defendant.

Service of this Notice and attached Petition and Bond acknowledged this 29th day of January, 1944.

JOHN D. LYONS, JR.

THOS. H. McKAY

Attorneys for Plaintiff.

per JDL

[Endorsed]: Filed Feb. 2, 1944. [13]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES

To the Honorable Superior Court of the State of Arizona, in and for the County of Pima:

The petition of the Tucson Gas, Electric Light and Power Company, a corporation, the above named defendant, respectfully shows:

1. That the above entitled action has been brought, and is now pending, in the above named Superior Court of the State of Arizona, in and for the County of Pima, in which the above named City of Tucson, a Municipal Corporation, is plaintiff and the Tucson Gas, Electric Light and Power Company, a corporation, is defendant.

2. That this action is an action at law of a civil nature, to-wit: an action by the plaintiff to condemn all the property owned by the defendant in Pima, Pinal, Santa Cruz and Cochise Counties in the State of Arizona, which is devoted to public service, to-wit: the generating, obtaining and distributing of electrical energy, and in the obtaining, manufacturing and distributing of gas, and to take possession of defendant's said property and devote it to said plaintiff's use.

3. Your petitioner further shows that this action involves a controversy between citizens of different states; that the plaintiff is a municipal corporation created, organized and existing under and by virtue of its Charter and the Constitution and Laws

of the State of Arizona and is located within the County of Pima, State of Arizona, and is a citizen and resident of said State of Arizona; that the defendant is a corporation created, organized and existing under and by virtue of the laws of the State of Colorado and is a citizen and resident of the State of Colorado and is not a citizen or resident of the State of Arizona; and that said City of Tucson at the time when this suit was instituted, ever since has been, and now is a citizen and resident of the State of Arizona, and at the time when this suit was instituted the said defendant was, ever since has been, and now is a citizen and resident of the State of Colorado and not a citizen or resident of the State of Arizona.

4. That this action is one in which the District Courts of the United States are given original jurisdiction.

5. That the time in which your petitioner, the defendant in this action, is required by the laws of the State of Arizona to answer or plead to the complaint in the above entitled action has not yet expired.

6. That the matter in controversy in this action exceeds exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

7. That your petitioner offers herewith a bond with good and sufficient surety conditioned that it will enter in the District Court of the United States, for the District of Arizona, at Tucson, Arizona, within thirty (30) days from the filing of this petition, a certified copy of the record in this action,

and will pay all costs that may be awarded against it by the said District Court of the United States, for the District of Arizona, in case said court shall hold that this action was wrongfully or improperly removed thereto. [14]

8. That prior to the filing of this petition and of said bond for removal of this cause, written notice of the intention of said defendant to file said petition and bond was given by your petitioner to the plaintiff, as required by law, and a true copy of said notice, with proof of the service of the same, is hereto attached and made a part hereof.

Wherefore, your petitioner prays that this Honorable Court accept said petition and bond and the surety thereon, and do make an order that this action be removed to the District Court of the United States, for the District of Arizona, and that this Honorable Court proceed no further in this action, except to accept said petition and bond and order such removal.

THE TUCSON GAS, ELEC-
TRIC LIGHT AND POWER
COMPANY,

a corporation,

By M. A. POOLER

Its President

[Corporate Seal]

State of Arizona

County of Pima—ss.

M. A. Pooler, being first duly sworn, deposes and says: That he is President of The Tucson Gas,

Electric Light and Power Company, a corporation, defendant named in the above entitled and numbered action; that he makes this affidavit for and on behalf of said defendant, being thereunto duly authorized; that he has read the foregoing petition for removal to the District Court of the United States, for the District of Arizona, in the above entitled action and knows the contents thereof, and that the matters therein stated are true in substance and in fact.

M. A. POOLER

Subscribed and sworn to before me, the undersigned notary public, this 28th day of January, 1944.

[Seal]

MABELLE NICHOLSON

Notary Public.

My commission expires: Feb. 11, 1947.

DARNELL & ROBERTSON

By **GEORGE R. DARNELL**

A Member of the Firm

Attorneys for Defendant.

[Endorsed]: Filed Feb. 2, 1944. [15]

[Title of Superior Court and Cause.]

**BOND FOR REMOVAL TO THE DISTRICT
COURT OF THE UNITED STATES**

Know All Men By These Presents:

That we, The Tucson Gas, Electric Light and Power Company, a corporation, as principal, and the United States Fidelity and Guaranty Company,

a corporation organized under the laws of the State of Maryland, and authorized to transact business as a surety company and to become surety upon bonds in the State of Arizona and in the courts of the United States, as surety, are held and firmly bound unto the City of Tucson, a municipal corporation, its successors or assigns, the plaintiff in the above entitled action, in the penal sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, to be paid unto the said City of Tucson, plaintiff, for which payment well and truly be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and executed by us this 28th day of January, 1944.

The condition of this obligation is such that,

Whereas, the said The Tucson Gas, Electric Light and Power Company, a corporation, defendant in the above entitled action, has applied by petition to the Superior Court of the State of Arizona, in and for the County of Pima, for the removal of the above entitled action from the Superior Court of the State of Arizona, in and for the County of Pima, to the District Court of the United States for the District of Arizona, and is about to file such petition and bond in the Superior Court.

Now, Therefore, if the said The Tucson Gas, Electric Light and Power Company, defendant, shall enter in the said District Court of the United States, for the District of Arizona, within thirty

(30) days from the date of the filing of the petition for removal, a certified copy of the record in said action, and shall well and truly pay all costs that may be awarded by the said District Court of the United States, for the District of Arizona, if the said court shall hold that said action was wrongfully or improperly removed thereto then this obligation shall be void; otherwise to remain in full force and effect.

[Seal]

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY,

a corporation,

By M. A. POOLER

Its President

UNITED STATES FIDELITY AND GUARANTY COMPANY,

a corporation,

By H. R. TALMAGE

Attorney-in-Fact

Approved this 31st day of January, 1944.

[Seal]

WM. G. HALL

Judge of The Superior Court of the State of Arizona, in and for the County of Pima. [16]

[Endorsed]: Filed Feb. 2, 1944. [17]

[Title of Superior Court and Cause.]

ORDER

The Tucson Gas, Electric Light and Power Company, a corporation, the defendant in the above entitled action, having presented to this Court its petition for the removal of the above entitled cause to the District Court of the United States, for the District of Arizona, and having also presented a bond in due form for such removal, and due notice of the presentation of said petition and bond having been given,

It Is Now Ordered that said petition and bond be accepted and that this action be, and it is hereby, removed from the Superior Court of the State of Arizona, in and for the County of Pima, to the District Court of the United States, for the District of Arizona, that the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith, and that this Court proceed no further in this cause.

Done in open Court this 31st day of January, 1944.

WM. G. HALL

Judge of the Superior Court of the State of Arizona, in and for the County of Pima.

[Endorsed]: Filed Feb. 2, 1944. [18]

In the United States District Court
For the District of Arizona

No. Tucson—212 Civil

CITY OF TUCSON, a Municipal Corporation,
Plaintiff,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Defendant.

To: City of Tucson, a Municipal Corporation,
Plaintiff, and John D. Lyons, Jr., City Attor-
ney, and Thomas H. McKay, Assistant City
Attorney, Attorneys for Plaintiff.

NOTICE OF REMOVAL

You and each of you will please take notice that on the 31st day of January, 1944, by an order of the Superior Court of the State of Arizona, in and for the County of Pima, the above entitled cause was duly transferred from said Court to the District Court of the United States for the District of Arizona, at Tucson, and that a transcript of the record in said cause has this day been duly filed in said United States District Court.

Dated this 2nd day of February, 1944.

DARNELL & ROBERTSON

By GEORGE R. DARNELL,

A Member of the Firm

Attorneys for Defendant.

Copy received this 2nd day of February, 1944.

JOHN D. LYONS, JR.

City Attorney

By THOS. H. McKAY

Assistant

Attorneys for Plaintiff

[Endorsed]: Filed Feb. 2, 1944. [19]

In the Superior Court of the State of Arizona

In and For the County of Pima

No. 24185

CITY OF TUCSON, a Municipal Corporation,
Plaintiff,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Defendant.

MOTION OF DEFENDANT TO DISMISS

Comes now the above named defendant, The Tucson Gas, Electric Light and Power Company, a corporation, and moves the court to dismiss the complaint in the above entitled action against it for the reason that said complaint fails to state a claim against the defendant upon which relief can be granted.

Dated this 31st day of January, 1944.

Respectfully submitted,

DARNELL & ROBERTSON

By GEORGE R. DARNELL

A Member of the Firm

Attorneys for Defendant.

. . . No allegation is contained in said complaint setting forth the power or authority of the plaintiff to institute an action in condemnation against the defendant, or to otherwise acquire, by any method, the property of the defendant. The plaintiff has no power or authority to condemn the property of this defendant and will have none until and unless an election shall have been held submitting the question as to whether the City shall be empowered or authorized to acquire the property of the defendant to the taxpayers of the City, who must be qualified electors, and a majority of these taxpayers vote in the affirmative to grant the City such power or authority. . . . The Statutes of Arizona fail to provide adequate and appropriate machinery for the ascertaining of constitutional compensation which defendant would be entitled to receive in a condemnation proceeding to acquire its property.

The Arizona statutes do not make suitable and adequate provision for the ascertainment of compensation and payment thereof for the taking of public utility property in that Article 9 of the 1939 Arizona Code, Sections 27-901 to 27-921, in-

clusive, contemplate only the value of real estate and improvements.

Respectfully submitted,

DARNELL & ROBERTSON

By GEORGE R. DARNELL

A Member of the Firm

Attorneys for Defendant. [20]

Copy received this 31st day of January, 1944.

JOHN D. LYONS, JR.,

City Attorney

By THOS. H. McKAY,

Assistant

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 2, 1944. [21]

[Title of Court and Cause.]

Minute Entry of February 10, 1944

This case comes on for hearing this day on the Defendant's Motion to Dismiss. George Darnell, Esquire, is present on behalf of the Defendant. John D. Lyons, Esquire, is present on behalf of the Plaintiff. Said counsel for the defendant states ready. Said counsel for the plaintiff states desire for full time under the rule to prepare argument and asks for continuance. Said counsel for the defendant requests hearing at this time.

It Is Ordered that this case be continued to the hour of ten o'clock a. m., Monday, February 14, 1944. [22]

[Title of Court and Cause.]

Minute Entry of March 6, 1944

This case comes on regularly for hearing this day on the Defendant's motion to dismiss. George Darnell, Esquire, is present as counsel for the Defendant. John D. Lyons, Esquire, is present on behalf of the Plaintiff.

The said motion is now duly argued and submitted.

It Is Ordered that counsel be allowed to Saturday, March 11, 1944, to file additional memorandum.

[23]

[Title of Court and Cause.]

Minute Entry of March 9, 1944

George Darnell, Esquire, is present as counsel for the Defendant. John D. Lyons, Esquire, is present on behalf of the plaintiff.

Said counsel for the defendant now offers amendment to defendant's motion to dismiss. Said counsel for the plaintiff states no objection inasmuch as it is a jurisdictional matter which under the rule the defendant has the right to raise.

It Is Ordered that the defendant be allowed to file amendment, and

It Is Further Ordered that the defendant's time to file memorandum on grounds one and two of the motion to dismiss, heretofore argued, be extended to March 16, 1944, and

It Is Further Ordered that counsel for the plain-

tiff be allowed to March 16, 1944, to file memorandum in re amendment to motion to dismiss, and

It Is Further Ordered that Monday, March 20, 1944, be fixed as the date for argument on third ground for motion to dismiss. [24]

In the United States District Court
For the District of Arizona

Civ. No. 212 Tucson

CITY OF TUCSON, a Municipal Corporation,
Plaintiff,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Defendant.

AMENDMENT OF MOTION OF DEFENDANT
TO DISMISS

Comes now the above defendant and by way of amendment or addition to its motion to dismiss hereby presents to the court a third ground or reason why the said complaint in this action fails to state a claim against the defendant upon which relief can be granted:

III.

Condemnation of Defendant's Property by Plaintiff Would Constitute the Taking of Private Property for Private Use in Violation of Section 17 of

Article II of the Constitution of the State of Arizona.

* * *

Respectfully submitted,
DARNELL & ROBERTSON
By GEORGE R. DARNELL,
A Member of the Firm
Attorneys for Defendant.

Copy received this 9th day of March, 1944.

J. D. LYONS

City Attorney

THOS. H. McKAY

Assistant City Attorney

Attorneys for Plaintiff

[Endorsed]: Filed Mar. 9, 1944. [25]

[Title of District Court and Cause.]

ADDITIONAL MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S AMENDMENT OF MO-
TION TO DISMISS

. . . The Court, therefore, may determine as a matter of law under the provisions of Section 17 of Article 2 of the State Constitution and the provisions of Section 27-907 of the Code that the proposed taking is in violation of and contrary

to the State Constitution, and contrary to law and void.

Respectfully submitted,
DARNELL & ROBERTSON
By GEORGE R. DARNELL
A member of the Firm
Attorneys for Defendant

Dated this 11th day of March, 1944.

Copy received this 11th day of March, 1944.

J. D. LYONS, JR.

City Attorney

THOS. H. McKAY

Assistant City Attorney

Attorney for Plaintiff

[Endorsed]: Filed Mar. 11, 1944. [26]

[Title of District Court and Cause.]

ADDITIONAL MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND THE AMENDMENT OF SAID MOTION

I.

An Election Is Necessary to Empower Plaintiff to Acquire a Utility. * * *

II.

* * * Statutes of Arizona Do Not Make Adequate and Appropriate Provision for Ascertaining the

Constitutional Compensation Which Defendant
Would Be Entitled to Receive. * * *

Respectfully submitted,

DARNELL & ROBERTSON

By GEORGE R. DARNELL,

A Member of the Firm

Attorneys for Defendant.

Copy received this 17th day of March, 1944.

J. D. LYONS, JR.

City Attorney

THOS. H. McKAY

Assistant City Attorney

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 17, 1944. [27]

[Title of District Court and Cause.]

Minute Entry of April 3, 1944

This case comes on regularly for hearing this day on the defendant's motion to dismiss. George Darnell, Esquire, is present as counsel for the Defendant. John D. Lyons, Esquire, is present on behalf of the Plaintiff. Harry O. Juliani, Esquire, is present on behalf of the Intervener.

It Is Ordered that the defendant's motion to dismiss be passed and stricken from the calendar until called up by either party on five days notice.

[28]

[Title of District Court and Cause.]

Minute Entry of September 1, 1944

Thomas J. Elliott, Esquire, is present on behalf of the plaintiff, and on motion of said counsel.

It Is Ordered that Thomas J. Elliott, Esquire, be and he is substituted as counsel for the plaintiff in the place and stead of John D. Lyons, Jr.

George R. Darnell, Esquire, and Lawrence V. Robertson, Esquire, are present on behalf of the defendant. Defendant's motion and amended motion to dismiss is now duly argued. Whereupon, at the hour of 11:05 a. m.

It Is Ordered that the further argument of this case be continued to the hour of 11:15 a. m., this date, to which time counsel are excused.

Subsequently, at the hour of 11:15 a. m., all counsel being present pursuant to recess, further argument is now had.

Whereupon, at the hour of 12:00 noon,

It Is Ordered that the further argument of this case be continued to the hour of 2:00 p. m., this date, to which time the counsel are excused.

Subsequently, at the hour of 2:00 p. m., all counsel being present pursuant to recess, further argument is now had.

Whereupon, at the hour of 3:30 p. m.,

It Is Ordered that the further argument of this case be continued to the hour of 3:40 p. m., this date, to which time counsel are excused.

Subsequently, at the hour of 3:40 p. m., all coun-

sel being present pursuant to recess, further argument is now had.

Whereupon, at the hour of 4:45 p. m.,

It Is Ordered that the further argument of this case be continued to the hour of 10:00 a. m., Saturday, September 2, 1944, to which time counsel are excused. [29]

[Title of District Court and Cause.]

Minute Entry of September 5, 1944

Thomas J. Elliott, Esquire, Harry O. Juliani, Esquire, and Gaynor K. Stover, Esquire, are present on behalf of the plaintiff, and George R. Darnell, Esquire, and Lawrence V. Robertson, Esquire, are present on behalf of the defendant. All counsel being present pursuant to recess, further argument on defendant's motion and amended motion to dismiss are now had.

Whereupon, at the hour of 4:30 P. M.,

It Is Ordered that the further argument of this case be continued to the hour of 10:00 A. M., Wednesday, September 6, 1944, to which time all counsel are excused. [30]

[Title of District Court and Cause.]

Minute Entry of September 6, 1944

Thomas J. Elliott, Esquire, Harry O. Juliani, Esquire, and Gaynor K. Stover, Esquire, are pres-

ent on behalf of the plaintiff, and George R. Darnell, Esquire, and Lawrence V. Robertson, Esquire, are present on behalf of the defendant. All counsel being present pursuant to recess, further argument on defendant's motion and amended motion to dismiss are now had.

Whereupon, at the hour of 12:00 noon,

It Is Ordered that the further argument of this case be continued to the hour of 2:00 p. m., this date, to which time all counsel are excused.

Subsequently, at the hour of 2:00 p. m., all counsel being present pursuant to recess, further argument is now had.

Whereupon, It Is Ordered that the defendant's motion and amended motion to dismiss be submitted, and by the Court taken under advisement.

[31]

[Title of District Court and Cause.]

Minute Entry of September 8, 1944

Defendant's motion to dismiss and amended motion to dismiss having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

It Is Ordered that said motion to dismiss and amended motion to dismiss be, and the same are hereby granted. [32]

In the United States District Court
For the District of Arizona

Minute Entry of Wednesday, September 20, 1945

Civ. No. 212 Tucson

CITY OF TUCSON, a Municipal Corporation,
Plaintiff,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Defendant,

JUDGMENT DISMISSING ACTION ON DE-
FENDANT'S MOTION AND AMENDED
MOTION TO DISMISS

The motion and amended motion of the defendant in the above entitled cause to dismiss the above entitled action, on the ground that the complaint herein fails to state a claim upon which relief can be granted, having been finally argued and submitted to the court on the 6th day of September, 1944, and the said motion and amended motion of defendant having been granted by the court on the 8th day of September, 1944, and

More than ten (10) days having elapsed since the granting of said defendant's motions by the court, and the plaintiff not having pleaded further herein;
Now, therefor,

It Is Hereby Ordered, Adjudged and Decreed:
That this cause be, and hereby is, dismissed, and that defendant recover from plaintiff its costs here-

in expended in the amount of Forty-Two and 50/100 Dollars (\$42.50).

Done in Open Court this 20th day of September, 1944.

ALBERT M. SAMES

District Judge

Copy received and approved as to form this 20th day of September, 1944.

THOS. J. ELLIOTT

City Attorney [33]

[Title of District Court and Cause.]

DOCKET ENTRIES

1944

Filings-Proceedings

Mar 9—Darnell pres; Lyons pres; Darnell offers amendment to deft's motion to dismiss, Lyons states no objection, inasmuch as matter is jurisdictional which under rule deft has right to raise; Order allow deft file amendment and Order extend time of counsel to file memo on grounds one and two of motion to dismiss, heretofore argued, to March 16, 1944; and order allow Lyons to March 16th, 1944, to file memo in re amendment to motion to dismiss today filed; and Order fix Monday, March 20, 1944, as date for argument on Third ground of Motion to Dismiss.

- 5 Mar 9—File defendant's amendment to defendant's motion to dismiss.
- 14 Aug 23—File deft's notice of hearing on deft's motion to dismiss and deft's amendment of motion to dismiss for September 1, 1944.
- 15 Sep 20—Ent & file Judgment dismissing action on deft's motion and amended motion to dismiss, taxing costs for deft at \$42.50.
- 16 Sep 20—File deft's cost bill, approved by counsel for pltf.
- Sep 20—Ent costs as taxed in JD.
- Oct 7—Issue notice to counsel of entry of judgment.
- 17 Dec 19—File notice of appeal to the Ninth Circuit Court of Appeals for the Ninth Circuit.
- Dec 19—Mail copy of notice of appeal to Darnell & Robertson.
- 18 Dec 19—File cost bond on appeal (U.S.F&G Co., \$250.00). [34]
-

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Notice is hereby given that the City of Tucson, a municipal corporation, plaintiff in the above entitled action, hereby appeals to the Circuit Court of

Appeals for the Ninth Circuit from the final judgment entered in this action on the 20th day of September, 1944.

THOS. J. ELLIOTT

Attorney for Plaintiff and
Appellant.

Copy received this 19th day of December, 1944.

DARNELL & ROBERTSON

By L. V. ROBERTSON

Attorneys for Defendant

[Endorsed]: Filed Dec. 19, 1944. [35]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That, City of Tucson, a municipal corporation, plaintiff in the above entitled action as Principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized and qualified to be and become surety on judicial bonds within the State of Arizona, as surety, are held and firmly bound unto the Tucson Gas, Electric Light and Power Company, a corporation, defendant in the above entitled action, in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said Tucson Gas, Electric Light and Power Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally by these presents.

Signed with our seals and dated this 19th day of December, 1944.

Whereas, on September 20, 1944, in an action pending in the United States District Court for the District of Arizona, between City of Tucson, a municipal corporation, as plaintiff, and Tucson Gas, Electric Light and Power Company, a corporation, as defendant, a judgment was rendered against the said plaintiff, and the said plaintiff having filed in said Court a Notice of Appeal to the United States Circuit Court for the Ninth Circuit at San Francisco, in the State of California;

Now, the condition of the above obligation is such that if the said City of Tucson, a municipal corporation, shall prosecute said appeal to effect and if for any reason the appeal is dismissed, or if the judgment is affirmed, to satisfy in full and pay all costs as the Appellate Court may adjudge and award in favor of the defendant aforementioned, then the above obligation to be void; otherwise to remain in full force and virtue.

CITY OF TUCSON, a Municipal
Corporation,

Principal

By HENRY O. JAASTAD

Mayor

[Seal]

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY, a Corporation,

Surety

By W. E. LOVEJOY

Attorney in Fact

Attest:

[Seal]

CARL M. HITT

City Clerk [36]

Form of Bond and sufficiency of Sureties approved this day of, 1944.

.....

Judge

Copy received this 19th day of December, 1944.

DARNELL & ROBERTSON

By L. V. ROBERTSON

Attorneys for defendant.

[Endorsed]: Filed Dec. 19, 1944. [37]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The point upon which Appellant intends to rely on in this Appeal is as follows:

1. The Court erred in granting judgment dismissing plaintiff's complaint for failure to state a claim.

THOS. J. ELLIOTT

Attorney for Plaintiff and
Appellant.

Copy received this 28th day of December, 1944.

DARNELL & ROBERTSON

By GEORGE R. DARNELL

Attorneys for Defendant and
Appellee.

[Endorsed]: Filed Dec. 30, 1944. [38]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated by and between the parties hereto that the record on appeal herein shall consist of the following items:

1. Complaint.
2. Summons With Sheriff's Return.
3. Notice of Filing Petition for Removal to the District Court of the United States.
4. Petition for Removal to the District Court of the United States.
5. Bond for Removal to the District Court of the United States.
6. Order for Removal to the District Court of the United States.
7. Notice of Removal to the District Court of the United States.
8. Motion of Defendant to Dismiss (Page 1, Lines 1 to 22, inc.) with points in support thereof, as follows: I. (Copy lines 27 page 1 to line 5 page 2, inc.). II. (copy lines 28 page 2 to line 4 page 3, inc.); (copy lines 4 to 8 inc. page 5), (copy lines 24 to 29 inc. page 5). [39]

9. Amendment of Motion of Defendant to Dismiss, filed March 9, 1944, (Page 1, lines 1 to 15 inc.) with points in support thereof, as follows: III. (copy line 16 page 1 to line 19 page 1, inc.), (copy lines 26 to end of page 2).

10. Additional Memorandum of Points and Authorities in Support of Defendant's Amendment of Motion to Dismiss, filed March 11, 1944, (lines 6 to 8 inc. page 1) with points in support thereof as follows: (copy lines 11 to 30 inc. page 2).

11. Additional Memorandum of Authorities in Support of Defendant's Motion to Dismiss and the Amendment of Said Motion, filed March 17, 1944, (lines 6 to 8 inc. page 1) with points in support thereof, as follows: I. (copy lines 11 to 13 inc. page 1). II. (copy lines 27 to 30 inc. page 3), (copy lines 17 to 28 inc. page 7).

12. Minute entries dated in 1944 as follows: February 10; March 6, 8; April 3; September 1, 5, 6, 8, 20.

13. Docket entries dated in 1944 as follows: March 9; August 23; September 20; October 7; December 19.

14. Judgment.

15. Notice of Appeal.

16. Bond for Costs on Appeal.

17. Statement of Points on Which Appellant Intends to Rely on Appeal.

18. This Stipulation.

THOS. J. ELLIOTT,

Attorney for Plaintiff and

Appellant.

DARNELL & ROBERTSON

By GEORGE R. DARNELL,

A Member of the Firm

Attorneys for Defendant and

Appellee.

[Endorsed]: Filed Dec. 30, 1944. [40]

In the United States District Court
For the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona—ss.

I. Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of City of Tucson, a Municipal Corporation, Plaintiff, versus The Tucson Gas, Electric Light and Power Company, a corporation, Defendant, numbered Civil-212-Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 40, inclusive, contain a full, true and correct transcript of the proceedings of said cause

and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Stipulation as to Record on Appeal filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$13.25 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the Seal of the said Court this 15th day of March, 1945.

[Seal] EDWARD W. SCRUGGS,
Clerk. [41]

[Endorsed]: No. 11005. United States Circuit Court of Appeals for the Ninth Circuit. City of Tucson, a Municipal Corporation, Appellant, vs. The Tucson Gas, Electric Light and Power Company, a corporation, Appellee. Transcript of Record. Upon appeal from the District Court of the United States for the District of Arizona.

Filed March 19, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11005

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD FOR PRINT-
ING

Comes now the appellant in the above-entitled cause and hereby adopts as its statement of points on which it intends to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.

Appellant hereby designates for printing the entire certified transcript of the record in accordance with "Stipulation As to Record on Appeal" appearing in the original typewritten transcript of the record herein.

THOS. J. ELLIOTT,
Attorney for Appellant.

Service of the foregoing statement of points and designation of record is acknowledged this 29th day of March, 1945.

DARNELL & ROBERTSON

By LAWRENCE V. ROBERTSON

A Member of the Firm,
Attorneys for Appellee.

[Endorsed]: Filed March 31, 1945. Paul P.
O'Brien, Clerk.

No. 11005

United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a corporation,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

AUG 14 1945

No. 11005

United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF TUCSON, a Municipal Corporation,
Appellant,
vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a corporation,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Certificate of Clerk of Superior Court.....	4
Certificate of Clerk of United States District Court	8
Docket Entries of February 2, 1944.....	6
Filing Endorsements of Clerk of Superior Court on:	
Bond on Removal	3
Complaint	2
Motion to Dismiss	4
Notice of Petition for Removal.....	3
Order of Removal	4
Petition for Removal	3
Summons	2
Names and Addresses of Attorneys.....	1
Stipulation as to Supplemental Record.....	7

ATTORNEYS OF RECORD

THOMAS J. ELLIOTT, Esquire,

615 Valley National Building,
Tucson, Arizona.

Attorney for Appellant.

DARNELL & ROBERTSON,

410 Valley National Building,
Tucson, Arizona.

Attorneys for Appellee. [3*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Arizona
In and for the County of Pima

No. 24185

CITY OF TUCSON, a Municipal Corporation,
Plaintiff,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a corporation,
Defendant.

COMPLAINT

[Endorsed]: Filed Jan. 12, 1944. Belle D.
Hall, Clerk, Grayce I. Gibson, deputy

[Endorsed]: Filed Feb. 2, 1944. Edward W.
Scruggs, Clerk, United States District Court for
the District of Arizona. By Hugh M. Caldwell,
Deputy Clerk. [4]

[Title of Superior Court and Cause.]

SUMMONS

[Endorsed]: Filed Jan. 17, 1944. Belle D.
Hall, Clerk, Grayce I. Gibson, deputy.

[Endorsed]: Filed Feb. 2, 1944. Edward W.
Scruggs, Clerk, United States District Court for
the District of Arizona. By Hugh M. Caldwell,
Deputy Clerk. [5]

[Title of Superior Court and Cause.]

NOTICE

[Endorsed]: Filed Jan. 29, 1944. Belle D. Hall, Clerk, Eva L. Cloud, deputy.

[Endorsed]: Filed Feb. 2, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Hugh M. Caldwell, Deputy Clerk. [6]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES.

[Endorsed]: Filed Jan. 31, 1944. Belle D. Hall, Clerk, Grayce I. Gibson, deputy.

[Endorsed]: Filed Feb. 2, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Hugh M. Caldwell, Deputy Clerk. [7]

[Title of Superior Court and Cause.]

BOND FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES.

[Endorsed]: Filed Jan. 31, 1944. Belle D. Hall, Clerk.

[Endorsed]: Filed Feb. 2, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Hugh M. Caldwell, Deputy Clerk. [8]

[Title of Superior Court and Cause.]

ORDER

[Endorsed]: Filed Jan. 31, 1944, at 10:14 A. M. Belle D. Hall, Clerk.

[Endorsed]: Filed Feb. 2, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Hugh M. Caldwell, Deputy Clerk. [9]

[Title of Superior Court and Cause.]

MOTION OF DEFENDANT TO DISMISS

[Endorsed]: Filed Jan. 31, 1944. Belle D. Hall, Clerk, Grayce I. Gibson, deputy.

[Endorsed]: Filed Feb. 2, 1944. Edward W. Scruggs, clerk, United States District Court for the District of Arizona. By Hugh M. Caldwell, Deputy Clerk. [10]

[Title of Superior Court and Cause.]

CERTIFICATE OF RECORD TO THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA, TUCSON,
ARIZONA.

State of Arizona,
County of Pima—ss.

I, Belle D. Hall, Clerk of the Superior Court of the state of Arizona, in and for the county of Pima,

do hereby certify the above and foregoing to be a full, true and correct copy of the record, and the whole thereof in the above-entitled suit, heretofore pending in said Superior court, being a suit numbered 24185, where in the City of Tucson is plaintiff, and The Tucson Gas, Electric Light and Power Company, a corporation, is defendant, said record consisting of the following:

1. Complaint, filed January 12, 1944;
2. Summons, and return thereon, filed January 17, 1944;
3. Notice, with copy of Petition for Removal to the District Court and Bond for Removal to the District Court attached, filed January 29, 1944;
4. Demand for Jury, filed January 31, 1944;
5. Motion of Defendant to Dismiss, filed January 31, 1944;
6. Petition for Removal to the District Court of the United States, with copy of notice and Bond for Removal to the District Court attached, filed January 31, 1944;
7. Bond for Removal to the District Court of the United States, filed January 31, 1944;
8. Certified copy of the Minute Entries in this case;
9. Order of Removal, filed January 31, 1944.

In Testimony Whereof, I have hereunto set my

hand and seal of said Superior Court, this 1st day of February, 1944.

[Seal] BELLE D. HALL

Clerk of the Superior Court of the State of Arizona, in and for the county of Pima. [11]

[Endorsed]: Filed Feb. 2, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Hugh M. Caldwell, Deputy Clerk. [12]

In the United States District Court
For the District of Arizona

Civil—212—Tucson

CITY OF TUCSON, a Municipal Corporation,
Plaintiff,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a corporation,
Defendant.

DOCKET ENTRIES

Date	Filings-Proceedings
1944	
1 Feb 2	File record on removal from Pima County Superior Court: (Complaint (Summons ret'd by Sheriff served (Notice of Petition for Removal (Petition for removal to U. S. Dist. Court.

(Copy of bond on removal.

(Plaintiff's demand for jury trial

(Motion of defendant to dismiss

(Petition for removal to U. S. Dist.
Court.

(Notice of petition for removal

(Copy of bond for removal

(Copy of bond for removal

(Minutes

(Certificate of clerk

2 Feb 2 File deft's notice of removal. [13]

[Title of District Court and Cause.]

STIPULATION AS TO
SUPPLEMENTAL RECORD

It appearing that there have been erroneously omitted certain parts of the record of this action that are material on appeal, it is hereby stipulated by counsel for appellant and counsel for appellee that the clerk of the above entitled court may certify to the clerk of the Circuit Court of Appeals for the 9th circuit, the following additional portions of said record for printing as a supplement to the Transcript of Record on appeal:

(1) Filing Endorsements of the Clerk of the Superior Court on the Complaint, Summons, Notice of Petition for Removal, Petition for Removal, Bond on Removal, Order of Removal, Motion to Dismiss.

(2) Certificate of Clerk of Said Superior Court

to the Transcript of Record in This Cause Filed in the Above Court.

(3) All Docket Entries of February 2, 1944, in the Above Court.

(4) This Stipulation.

THOS. J. ELLIOTT

Attorney for Plaintiff-

Appellant

DARNELL & ROBERTSON

By GEORGE R. DARNELL

Attorneys for Defendant-

Appellee [14]

[Endorsed]: Filed Jul. 9, 1945. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Shirley R. Miller, Deputy Clerk. [15]

In the United States District Court

For the District of Arizona

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of City of Tucson, a Municipal Corporation, Plaintiff, versus The Tucson Gas, Electric Light and Power

Company, a corporation, Defendant, numbered Civil-212-Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 15, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Stipulation As To Supplemental Record filed in said cause and made a part of the supplemental transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said supplemental transcript of record amounts to the sum of \$3.40 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the Seal of the said Court this 10th day of July, 1945.

[Seal]

EDWARD W. SCRUGGS,

Clerk

By JEAN E. MICHAEL

Chief Deputy Clerk. [16]

[Endorsed]: No. 11005. United States Circuit Court of Appeals for the Ninth Circuit. City of Tucson, a Municipal Corporation, Appellant, vs. The Tucson Gas, Electric Light and Power Company, a corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 13, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Appellee.

Appellant's Opening Brief

THOS. J. ELLIOTT,
615 Valley National Bldg.
Tucson, Arizona
Attorney for Appellant.

Upon Appeal from the District Court of the United
States for the District of Arizona.

Service of the within and receipt of three copies there-
of is hereby admitted this.....day of.....,
A. D. 1945.

DARNELL & ROBERTSON,

By.....

Attorneys for Appellee.

FILED
JUL 5 - 1945
PAUL P. O'BRIEN,
CLERK

TOPICAL INDEX

	Pages
Statement of Jurisdiction.....	1, 2
Statement Of The Case.....	3, 4
Supplement To Statement Of Case.....	5
Specification Of Errors.....	6, 7
Propositions Of Law.....	7
Summary Of Argument.....	7, 8
Argument — Proposition Of Law No. I.....	9, 12
Argument — Proposition Of Law No. II.....	12, 16
(a) Complaint Invulnerable	12, 13
(b) Allegations Of Complaint Sufficient.....	13, 16
Conclusion	16

TABLE OF AUTHORITIES CITED

Cases

	Pages
In Re - Forsstrom, 44 Ariz. 472; 38 Pac. (2d) 878.....	14
Mayor and Alderman of Town of Madisonville vs. Cagle, 21 S. W. (2d) 385 & 386.....	14
Public Service Co. vs. City of Loveland, 245 Pac. 493 & 498	14
United States v. 243.22 Acres, 41 F. Supp. 469.....	13

Texts

Cyclopedia of Federal Procedure, Chapter 8, Section 760	12
McQuillin Mun. Corp. 2nd Edition, Revised Volume 4, section 1654	13

Constitution

Arizona, Article XIII — section 2, 3, 5.....	9
--	---

Statutes

Arizona Code, Annotated, 1939, Sections 16-301 to 16-304 Incl.	9, 11
Arizona Code, Annotated, 1939, sections 16-602 to 16-605 Incl.	9, 10, 11
Arizona Code, Annotated, 1939, sections 16-2601 to 16-2619 Incl.	9, 11, 12, 14
Arizona Code, Annotated, 1939, sections 27-901, 27-909 to 27-921, Incl.	9, 11, 14
28 U.S.C.A. - following sections 723 c.....	13

Charter — City of Tucson

Chapter IV - Section 1, (4), (7), (22), (24), (29).....	10
---	----

Rules Civil Procedure

District Courts

Rule 12 (b)	12
Rule 81 (a) (7)	13

INDEX TO APPENDIX

	Pages
Extract From Council Minutes — February 28, 1944.....	1, 2
Resolution No. 1964 — Ratifying Authorization For Con- demnation Proceedings As Set Forth In Resolution No. 1956	3, 4

**United States
Circuit Court of Appeals
For the Ninth Circuit**

CITY OF TUCSON, a Municipal Corporation,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,

Appellee.

Appellant's Opening Brief

STATEMENT OF JURISDICTION

City of Tucson, a municipal corporation, appellant herein plaintiff below, commenced this action originally in the Superior Court of the State of Arizona, in and for the County of Pima, against the Tucson Gas, Electric Light and Power Company, a corporation, appellee herein, defendant below (T.R. 2-22). Thereafter appellee filed in said court its verified petition for removal of said action to the District Court of the United States,

for the District of Arizona (T.R. 22-26) together with a surety bond for removal (T.R. 27-29) whereupon said Superior Court entered its order for removal without objection on the part of appellant (T.R. 30). The cause was then removed to the District Court of the United States, for the District of Arizona, and all further proceedings were had therein. (T.R. 31) (28 U.S.C.A. Sections 41 and 71).

Appellee filed its motion to dismiss the complaint herein upon the ground that said complaint failed to state a claim against the appellee upon which relief could be granted (T.R. 32-34) and subsequently appellee filed an amendment of said motion to dismiss presenting additional grounds why the complaint failed to state a claim against the appellee upon which relief could be granted (T.R. 36-39).

The District Court granted said motion to dismiss and amended motion to dismiss without filing an opinion, and appellant not pleading further, final judgment was entered dismissing the action (T.R. 42-44).

Within the statutory time appellant filed its notice of, and bond for costs on, appeal to the United States Circuit Court of Appeals for the Ninth Circuit for the purpose of appealing from the final judgment of said District Court (T.R. 45-48), (28 U.S.C.A. Section 225).

STATEMENT OF THE CASE

This action was brought by appellant herein, plaintiff below, to condemn the property of appellee herein, defendant below. Appellant is a municipal corporation duly organized, existing and operating under a so-called home rule charter, as authorized under the provisions of Article XIII of the Constitution of Arizona and under and by virtue of the provisions of Sections 16-301 to 16-303 inclusive, Arizona Code, Annotated, 1939, since the year 1929, and is located within Pima County, State of Arizona. Appellee is a corporation duly organized and existing under the laws of the State of Colorado and is duly authorized to, and is transacting business within the State of Arizona and Pima County, and is engaged in the business of generating, distributing and supplying electric light and power and artificial gas to the appellant and to its inhabitants, and to consumers located outside of the City of Tucson and within the State of Arizona (T.R. 2).

The complaint on which the action is based was originally filed in the Superior Court of the State of Arizona, in and for the County of Pima, on the 12th day of January, 1944. By said complaint, appellant sought to acquire all properties of appellee, within the City of Tucson, together with all properties located without the City of Tucson and within the State of Arizona, for the purpose of supplying electric light and power and natural and artificial gas to the City of Tucson and its inhabitants, as well as to consumers located outside of the City of Tucson and within the State of Arizona and within the area in which the appellee is now operating and supplying such commodities and services (T.R. 17-18).

Upon filing of said complaint summons forthwith issued to said appellee and service thereof was had upon said appellee on January 17, 1944.

Thereafter, upon petition of appellee, the cause was removed to the District Court of the United States, for the District of Arizona (T.R. 22-32). After removal to the District Court appellee moved the court to dismiss the complaint upon the ground that said complaint failed to state a claim against the appellee upon which relief could be granted and in support of said motion set forth various points (T.R. 32-34). Subsequent thereto an amendment of the motion to dismiss was filed by appellee setting forth a further ground or reason why the said complaint failed to state a claim against the appellee upon which relief could be granted, together with additional points or authorities in support of said motion to dismiss (T.R. 36-39).

The motion to dismiss and the amended motion to dismiss came on regularly for oral argument before the court and was duly argued and submitted and by the court taken under advisement (T.R. 35-42).

Thereafter the court entered its order granting said motion and amended motion to dismiss, and plaintiff not pleading further, the said District Court on the 20th day of September, 1944 entered its final judgment dismissing the action (T.R. 43-44).

From said final judgment dismissing the action this appeal is taken (T.R. 45-46).

SUPPLEMENT TO STATEMENT OF THE CASE

For a supplement to the foregoing statement of the case and as an appendix to appellant's brief, and for the further information of the Court, appellant submits that the operations of appellee within the City of Tucson are conducted and are being carried on under and by virtue of a franchise from appellant, and that the operations of appellee outside of the City of Tucson as alleged in the complaint are being conducted and carried on by appellee without franchise from any municipality or other consumers.

Further, that prior to the argument on the motion to dismiss, March 6, 1944, (T.R. 35) and subsequent to removal of said cause to the District Court, January 31, 1944, (T.R. 30-31), at a special election duly called and held for the purpose, on February 24, 1944, a majority of the taxpayers, who were qualified electors voted in favor of appellant acquiring the property and interest in property belonging to the appellee and described in the complaint, and in February 28, 1944, said vote was duly canvassed and the proposition was duly declared to have been carried and adopted (Extract From Council Minutes February 28, 1944—Appendix pages 1-2), and thereafter on February 28, 1944, the Mayor and Council of appellant duly passed and adopted a resolution ratifying and confirming the resolution referred to in paragraph X of appellant's complaint, (T.R. 19), and ratifying, confirming and approving any and all acts performed by the City Attorney and any and all other officers and agents of the appellant in pursuance thereof. (Resolution No. 1964, Appendix pages 3-4).

SPECIFICATION OF ERRORS

Specification of Error No. 1

The District Court erred in granting Appellee's motion and amended motion to dismiss the complaint herein for the reason that under the Constitution and Laws of the State of Arizona and the provisions of the Charter of the City of Tucson, Appellant is given the right, power and authority to condemn the property and interests in the property, described in said complaint, for the purpose of operating and maintaining a municipally owned electric light and power utility and for supplying and distributing electricity and natural and artificial gas for the City of Tucson and its inhabitants and to consumers located outside of said city and within the State of Arizona and within the area presently served by the Appellee herein.

Specification of Error No. 2

The court erred in granting appellee's motion and amended motion to dismiss the complaint herein for the reason that the complaint of Appellant sufficiently sets forth the allegations required to be contained in a complaint for condemnation of the property and interest in property described in said complaint, by the Constitution and Laws of the State of Arizona and the Charter of Appellant.

Specification of Error No. 3

The District Court erred in granting Appellee's motion and amended motion to dismiss the complaint here-

in for the reason that Appellant's complaint is invulnerable against a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to rule 12 (b) of the Rules of Civil Procedure For the District Courts Of The United States.

PROPOSITIONS OF LAW

I.

(Pertaining to Specification of Error No. 1)

The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee utility as described in the complaint herein.

II.

(Pertaining to Specification of Error Nos. 2 and 3)

The complaint herein, contains sufficient allegations on which the right of Appellant to exercise eminent domain and to condemn the property of Appellee can be adjudged by the District Court, and is invulnerable against a motion to dismiss under the provisions of rule 12 (b) of the Rules of Civil Procedure for the District Courts of the United States.

SUMMARY OF ARGUMENT

Proposition of Law No. I

(Pertaining to Specification of Error No. 1)

The legislature of Arizona has delegated the power to exercise the right of eminent domain and to condemn

Apellee's property, to the Appellant through the medium of Appellant's home rule charter and express provisions of the Arizona Code, Annotated, 1939.

Proposition of Law No. II

(Pertaining to Specification of Error Nos. 2 and 3)

(a) Complaint Invulnerable

The rules of civil procedure for the District Courts of the United States expressly provides that in proceedings in eminent domain, said rules do not apply, (rule 81 (a) (7); 28 U.S.C.A. following section 723 c), therefore a motion to dismiss made under rule 12 (b) of said rules should be denied.

(b) Allegations of Complaint sufficient

Appellant has met the requirements of the eminent domain statutes concerning the contents of its complaint, therefore the motion to dismiss said complaint for failure to state a claim on which relief could be granted, should be denied.

ARGUMENT

Proposition of Law No. I**(Pertaining to Specification of Error No. 1)**

The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee Utility as described in the Complaint herein.

The authority to exercise the right of eminent domain and to condemn property, for the purpose of operating and maintaining a municipally owned electric light and power utility and for supplying and distributing electricity and natural and artificial gas to inhabitants and to consumers, including other municipalities, located outside of their boundaries and within the State of Arizona and within the area presently served by the Appellee herein, is expressly given to municipal corporations of Arizona, pursuant to the following provisions of the Arizona Code, Annotated, 1939;

Sections 16-602 to 16-605 inclusive;

Sections 16-2601 to 16-2619 inclusive;

Sections 27-901, 27-906 to 27-916 inclusive;

In addition to the foregoing statutory provisions the Appellant, operating under the provisions of a so-called home rule or freeholders charter pursuant to Article XIII, sections 2, 3 and 5, of the Constitution of Arizona, and of sections 16-301 to 16-304, inclusive, Arizona Code, Annotated, 1939, is expressly authorized to exercise the right of eminent domain and to condemn property for the purpose of operating and maintaining a municipally owned electric light and power utility and for supplying and distributing electricity and natural and

artificial gas to its inhabitants and to consumers, including other municipalities, located outside the City and within the State of Arizona and within the area presently served by the Appellee, under and by virtue of the following provisions of Chapter IV, section I of said Charter, to-wit:

- Sub-section (4) page 5.
- Sub-section (7) page 6.
- Sub-section (22) page 9.
- Sub-section (24) page 9.
- Sub-section (29) page 10.

The authority to exercise the right of eminent domain and condemnation given Appellant under the foregoing provisions of the statutes and charter may be readily classified into three groups, as follows:

1. When financing is to be by the issuance of general obligation bonds.
2. When financing is to be by the issuance of revenue bonds.
3. When proceedings are under the general eminent domain statutes.

When the financing is to be by the issuance of general obligation bonds, the cities of Arizona, in addition to the powers already vested in them by their respective charters and by the general laws of the state, have the powers set forth in Article 6, volume I, Arizona Code, Annotated, 1939, being sections 16-601 to 16-614, and

with specific reference to sections 16-602 to 16-605 inclusive, may exercise the right of eminent domain in the exercise of such additional powers, the procedure to be followed, being that as outlined in said sections, namely, authorization at election, section 16-603; purchase by municipality when the municipality is at the time being served by a public utility under an existing franchise, the compensation required to be paid the utility in such event being equivalent to that as determined under the provisions of sections 27-901 to 27-921, Arizona Code, Annotated, 1939, provided, that cities are relieved from purchasing said utility in the event of wilful and persistent violations of such franchise. (sections 16-604 and 16-605, Arizona Code, Annotated, 1939).

When the financing is to be by the issuance of revenue bonds the municipalities in Arizona, in addition to the powers they otherwise have, have the further powers set forth in Article 26, Cumulative Pocket Supplement, volume I, Arizona Code, Annotated 1939, being sections 16-2601 to 16-2619 inclusive, and with specific reference to section 16-2603, may exercise the right of eminent domain in the exercise of such additional powers, the procedure to be followed being that as outlined in said sections, subject to the requirements and restrictions of sections 16-604 and 16-605, Arizona Code, Annotated, 1939, and without regard to the requirements, restrictions, or other provisions contained in any law, including, but not limited to, sections 16-602 and 16-603, Arizona Code, Annotated, 1939, (section 16-2618).

Appellant in its complaint (T.R. 19) has alleged that it proposes to finance the acquisition under the provisions

of Chapter 31, Laws 1943, being sections 16-2601 to 16-2619 inclusive, and therefore submits that by virtue of the Charter provisions herein referred to and sections 16-2601 to 16-2619 inclusive, Appellant has the right, power and authority to exercise the right of eminent domain and to condemn the property of Appellee in the manner and form contemplated by its complaint herein.

ARGUMENT

Proposition of Law No. II

(Pertaining to Specification of Error Nos. 2 and 3)

The Complaint herein contains sufficient allegations on which the right to exercise eminent domain and to condemn the property of Appellee can be adjudged by the District Court and is invulnerable against a motion to dismiss under the provisions of Rule 12 (b) of the Rules of Civil Procedure for the District Courts of the United States.

(a) Complaint Invulnerable.

Appellee's motion and amended motion to dismiss the complaint in the District Court was made under the provisions of Rule 12 (b) of the rules of civil procedure for the District Courts of the United States, (T.R. 32). These rules are inapplicable to proceedings for condemnation of property and the law of the state where the property is situated governs the practice, pleadings, forms and proceedings in such actions.

Cyc. of Federal Procedure, Vol 3, Chapter 8,
section 760, pages 446, 447;

United States v. 243.22 Acres of Land, 41 F. Supp. 469;

Rule 81 (a) (7) Rules of Civil Procedure, 28 U.S.C.A. following section 723 c;

therefore the complaint is invulnerable against a motion to dismiss made under said rules.

(b) Allegations of Complaint Sufficient.

Appellee, on its argument below in support of the motion to dismiss and the amended motion to dismiss advanced numerous and sundry reasons for granting the said motion and amended motion. No opinion was filed nor comment made by the District Court when the order granting said motion and amended motion was entered. Appellant is therefore unable to discuss the specific point or points on which the District Court based its order. It is however submitted that,

“When a state delegates to a municipality the right to condemn private property for a public use, and does not in the act delegating such authority provide a method for its exercise, the general law of the state prescribing the procedure, and the method of ascertaining the damages is, by implication, a part of the law delegating the power.”

McQuillin Mun. Corp. 2d Ed. Revised, Volume 4, section 1654, at top of page 645.

It is further submitted, that in the absence of a specific statutory requirement an election need not be held prior to the institution of condemnation proceedings;

Public Service Co. v. City of Loveland, 245 Pac.
493 to 498;

that the procedure for condemnation of real estate may
be properly applied to the condemnation of public util-
ities;

*Mayor and Alderman of Town of Madisonville
v. Cagle* 21 S.W. (2d) 385 at 386;

Public Service Co. v. City of Loveland, 245 Pac.
493.

and that if the procedure set forth in section 16-2601
to 16-2619 Arizona Code, Annotated, 1939, is deemed
inadequate the general statutory provisions covering the
exercise of eminent domain regardless of the method
of financing, being sections 27-910 to 27-916 inclusive,
Arizona Code, Annotated, can and do supplement the
same and present an adequate method for the exercise
of the power of eminent domain and condemnation in
Arizona.

In re Forsstrom, 44 Ariz. 472 at 478, 479;

Arizona Code, Annotated, 1939, Section 16-
2618.

Appellant's complaint showed upon its face;

That Appellant is a municipal corporation with-
in the State of Arizona, (T.R. 2).

That Appellee is engaged in public utility busi-
ness, electric light, power and gas. (T.R. 2).

That Appellee owned property and interest in property which are devoted to a public use and were used and useful by the Appellee in conducting said utility, describing said property and interests in property. (T.R. 17).

That the property and interests sought to be condemned are to be used for the purpose of supplying said utilities to the City of Tucson and its inhabitants, as well as to consumers outside said city and within the State of Arizona. (T.R. 17-18).

That the property and interests sought to be condemned constitutes all the property of Appellee used or useful for the purpose of supplying the said utilities. (T.R. 18).

That the taking of said property is for a public use and such taking is necessary for the operation and maintenance of a municipally owned utility and for supplying the Appellant and its inhabitants and consumers without the City and within the State and within the area presently served by Appellee. (T.R. 18).

That the property sought to be condemned is now devoted to a public use and that the public use to which it is sought to be applied by Appellant is a more necessary public use. (T.R. 19).

That the acquisition is to be financed pursuant to the provisions of the Municipal Revenue Bond Act of 1943, being Chapter 31, Laws 1943, sections 16-2601 to 16-2619, inclusive. (T.R. 19).

That the Mayor and Council of Appellant by resolution duly found and declared the property was necessary to the uses of the Appellant as set forth in the complaint and authorized the condemnation action to be instituted. (T.R. 19).

CONCLUSION

In view of the foregoing it is respectfully submitted that the final judgment of the Court below dismissing Appellant's complaint should be reversed and the cause remanded with directions to the trial court to enter judgment denying Appellee's motion to dismiss Appellant's complaint.

THOS. J. ELLIOTT,
615 Valley National Building
Tucson, Arizona
Attorney for Appellant.

APPENDIX

EXTRACT FROM THE MINUTES OF A MEETING OF THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA.

The Mayor and Council of the City of Tucson met in Special Session in the Council Chamber in the City Hall of the City of Tucson, Arizona, at 7:30 o'clock P. M. on the 28th day of February, 1944, all members having been notified of the time and place thereof.

Present: Councilmen Frank E. Dawson, Fred E. Lee, W. S. Nicholas, J. O. Niemann; Henry O. Jaastad, Mayor; Carl M. Hitt, City Clerk.

Absent: Councilmen William H. Codd and Homer L. Shantz, Jr.

The Mayor declared a quorum present.

“The Mayor announced that this was the time and place designated by law for opening and canvassing the returns of the City Special Election held on February 24, 1944, and declaring the results thereof. The City Clerk presented sealed envelopes containing the official returns of said election, and on motion by Councilman Niemann, seconded by Councilman Lee and unanimously carried, the sealed envelopes containing the official returns of the City Special Election held on February 24, 1944, as submitted by the various election boards, were opened, the votes were canvassed and the returns declared to be as follows:

ACQUISITION OF LOCAL UTILITY PROPERTIES

WARD	YES	NO	SPOILED	REJECTED	TOTAL VOTES
1	136	176	None	None	312
2	202	120	None	None	322
3	230	166	None	None	396
4	357	277	1	None	635
5	90	158	None	4	252
6	112	134	None	None	246
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
	1127	1031	1	4	2163

CERTIFICATE OF CLERK

I, Carl M. Hitt, the duly appointed, qualified and acting City Clerk of the City of Tucson, Arizona, do hereby certify that the foregoing is a true and correct Extract from the original Minutes of the meeting of the Mayor and Council of said City, held on the 28th day of February, 1944, in so far as said Minutes relate to matters set forth in the above Extract; and, that a quorum was present at said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said City this 29th day of June, 1945.

(Seal)

CARL M. HITT,
City Clerk.

RESOLUTION No. 1964

RATIFYING AUTHORIZATION FOR CONDEMN-
ATION PROCEEDINGS AS SET FORTH IN
RESOLUTION No. 1956.

WHEREAS, the Mayor and Council have heretofore authorized certain condemnation proceedings for the acquisition, as a single public utility, of a combined electric and gas plant and system, more particularly described and set forth in Resolution No. 1956 of the Mayor and Council of the City of Tucson, to which reference is hereby made for a more complete description of said authorization; and

WHEREAS, subsequent to the adoption of said Resolution No. 1956, to-wit, on the 24th day of February, 1944, a majority of the taxpayers of the City of Tucson, who are also qualified electors of said City, voting on the question at a special election, authorized the acquisition of said electric and gas plant and system; now, therefore,

BE IT RESOLVED BY THE MAYOR AND COUN-
CIL OF THE CITY OF TUCSON:

Section 1. That said Resolution No. 1956, and the whole thereof, is hereby ratified and confirmed, and that any and all acts performed by the City Attorney and/or any and all other officers and agents of the City of Tucson under and by virtue of said resolution be, and the same are hereby, ratified, confirmed and approved.

PASSED AND ADOPTED by the Mayor and Council of the City of Tucson, this 28th day of February, 1944.

(signed) HENRY O. JAASTAD,
Mayor.

Attest:

(signed) CARL M. HITT,
City Clerk.

No. 11005

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITY OF TUCSON, a Municipal Corporation,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COM-
PANY, a Corporation,

Appellee.

APPELLEE'S BRIEF.

DARNELL & ROBERTSON,

GEORGE R. DARNELL,

LAWRENCE V. ROBERTSON,

410-13 Valley National Building, Tucson, Ariz.,

Attorneys for Appellee.

FILED

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TOPICAL INDEX.

	PAGE
Statement of Jurisdiction.....	1
Statement of the Case.....	2
Summary of Argument.....	5
Replying to Appellant's Proposition of Law I.....	5
Appellant had no authority to institute an action against appellee to condemn its property.....	5
Court had jurisdiction only of Pima County property.....	6
Appellant could not acquire utility property located outside City of Tucson	6
Jurisdictional and Constitutional Questions Involved.....	7
No adequate method is provided by law for valuation of utility property	7
Valuation as of date of summons is unconstitutional.....	7
Proposed taking violates due process provisions of both state and federal constitutions.....	7
Replying to Appellant's Proposition of Law II.....	8
State procedure was followed by appellee.....	8
Complaint fails to state the right to condemn.....	8
Complaint fails to show certainty of compensation.....	8
Appellant may not condemn utility property serving in an- other municipality	8
Argument	9
Replying to Appellant's Proposition of Law I.....	9
Appellant had no authority to institute an action against appellee to condemn its property	9
Court had jurisdiction only of Pima County property.....	17
Appellant could not acquire utility property located outside City of Tucson.....	19

	PAGE
Jurisdictional and Constitutional Questions Involved.....	29
No adequate method provided by law for evaluating utility property	29
Valuation as of date of summons is unconstitutional.....	32
Proposed taking violates due process provisions of both the State and Federal Constitutions.....	35
Replying to Appellant's Proposition of Law II.....	38
State procedure was followed by appellee.....	38
Complaint fails to state right to condemn.....	39
Complaint fails to show certainty of compensation.....	40
Appellant may not condemn utility property serving in another municipality	42
Conclusion	46

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Allen v. Railroad Commission, 179 Cal. 68 (88), 175 Pac. 466 (474)	28
Childs v. City of Columbia, 87 S. C. 566, 70 S. E. 296.....	22
City of Bremerton v. North Pacific Public Service Co., 243 Fed. 980 (983).....	41
City of Phoenix v. Kasun, 54 Ariz. 470, 97 Pac. (2d) 210....	6, 20
Holmes Electric Protective Company v. Williams, 228 N. Y. 407, 127 N. E. 315.....	28
Lone Star Gas Company v. Fort Worth, 128 Tex. 392, 98 S. W. (2d) 799	31
Long, et al. v. Town of Thatcher, Ariz., 153 Pac. (2d) 153	44
Menderson v. Phoenix, 51 Ariz. 280, 76 Pac. (2d) 321.....	27
New Jersey Water Service Company v. Borough of Butler, 105 N. J. L. 563, 148 Atl. 616.....	35
Paris Mountain Water Company v. City of Greenville, 105 S. C. 180, 89 S. E. 669.....	14
Passaic Consolidated Water Company v. McCutcheon, Clerk et al., 105 N. J. L. 137, 144 Atl. 571.....	34
Phoenix v. Wright, 52 Ariz. 227, 80 Pac. (2d) 390.....	27
Public Service Company v. City of Loveland, 79 Colo. 216, 245 Pac. 493 (494)	39
Spear v. City of Bremerton, 90 Wash. 507, 156 Pac. 825.....	42
Suburban Investment Company v. City of Atlanta, et al., 148 Ga. 593, 97 S. E. 542.....	13
Town of South Tucson v. The Tucson Gas, Electric Light & Power Company, No. 10921, Fed. (2d)15, 42, 45	
Town of Tremonton v. Johnson, 49 Utah 307, 164 Pac. 190 (191)	11
Tuttle v. Knox County, 89 Tenn. 157, 14 S. W. 486.....	41

	PAGE
Vanderpoel v. Borough of Mt. Ephraim, 111 N. J. L. 423, 168 Atl. 575	38
Vreeland v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052.....	11
Watauga Water Company v. Scott, 111 Tenn. 321, 76 S. W. 888 (889)	32
Wright v. Donaldson, 144 Tenn. 239, 230 S. W. 605.....	40

CHARTER, CITY OF TUCSON.

Chapter IV—Sec. 1, (4), (7), (22), (24), (29).....	10
--	----

CONSTITUTIONAL PROVISIONS.

Constitution of Arizona, Art. 2, Sec. 4.....	36
Constitution of Arizona, Art. 2, Sec. 17.....7, 24, 25, 28, 32	
Constitution of Arizona, Art. 15, Sec. 2.....	25
Constitution of Arizona, Art. 15, Sec. 3.....	26
Constitution of the United States, Art. 14, Sec. 1	36

RULES OF CIVIL PROCEDURE FOR U. S. DISTRICT COURTS.

Rule 12 (b).....	4, 5, 38
------------------	----------

STATUTES.

Arizona Code, Anno., 1939, Secs. 16-602 to 16-605, incl.	9
Arizona Code, Anno., 1939, Sec. 16-603.....	9
Arizona Code, Anno., 1939, Secs. 16-2601 to 16-2619, incl.....	9
Arizona Code, Anno., 1939, Sec. 16-2603	9, 25
Arizona Code, Anno., 1939, Secs. 16-2603 to 16-2609, incl.....	9
Arizona Code, Anno., 1939, Sec. 21-429.....	8, 38
Arizona Code, Anno., 1939, Sec. 21-436.....	4 39
Arizona Code, Anno., 1939, Sec. 24-601.....	37
Arizona Code, Anno., 1939, Sec. 27-901	3, 10
Arizona Code, Anno., 1939, Secs. 27-901 to 27-921, incl.....	19
Arizona Code, Anno., 1939, Sec. 27-907.....	6, 19, 25
Arizona Code, Anno., 1939, Sec. 27-909.....	7, 18, 29

v.

PAGE

Arizona Code, Anno., 1939, Sec. 27-910	8, 39
Arizona Code, Anno., 1939, Sec. 27-915	30, 32
Arizona Code, Anno., 1939, Sec. 27-916	32, 35
Arizona Code, Anno., 1939, Sec. 27-917.....	36
Arizona Code, Anno., 1939, Sec. 27-918	7, 37
Arizona Code, Anno., 1939, Sec. 34-128.....	34
United States Code, Anno., Vol. 28, Sec. 41.....	1
United States Code, Anno., Vol. 28, Sec. 71.....	1
United States Code, Anno., Vol. 28, Sec. 72.....	1

TEXTBOOKS.

2 Lewis Eminent Domain, Par. 596.....	12
Levy on Municipal Funds, Annotations, 89 A. L. R. 863-870.....	38

INDEX TO APPENDIX.

PAGE

Charter of Tucson, Chapter 4, Par. 25.....	1
Section 27-910, A. C. A., 1939, Requirements Condemnation Complaint	1
Section 21-429, A. C. A., 1939, Rule 12, (b) Civil Procedure....	2
Parts of 1943 Municipal Revenue Bond Act of Arizona, cited in Brief, Sections 16-2601 to 16-2607 incl. and Sec. 26-2617, June 1943 Cumulative Pocket Supplement, A. C. A., 1939.....	2

then 1943 Arizona Code, Annotations 1939 — 6

No. 11005

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITY OF TUCSON, a Municipal Corporation,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COM-
PANY, a Corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Jurisdiction in this case rests upon diversity of citizenship of the parties and the amount of the matter in controversy, being a removed action from the Superior Court of the state of Arizona, in and for the county of Pima. [T. R. 2-32], 28 U. S. C., Sections 41, 71 and 72.

The appellant, plaintiff below, is a municipal corporation organized and existing under its charter and the constitution and laws of the state of Arizona. It is situate wholly within Pima County and is a citizen of Arizona. The appellee, defendant below, is a corporation organized under the laws of the state of Colorado and is a citizen and resident of that state. [T. R. 2 (par. 1 of the complaint): 24-27, Petition for Removal.]

The complaint was filed in the said Superior Court January 12, 1944, and summons was served upon appellee January 17, 1944.

Within the time to answer, appellee served upon appellant, and filed, Notice of Petition to Remove, Petition to Remove and Bond for Removal, and on January 31, 1944, the cause was ordered removed from the said Superior Court to the United States District Court. [Tr. 22-30.]

February 2, 1944, a Transcript of Record in said cause was filed in said United States District Court. [T. R. 31 and Supp. T. R.]

Thereafter proceedings were had as set forth in Appellant's Statement of Jurisdiction, the appeal herein being taken from the judgment dismissing the cause on the ground that the complaint fails to state a claim upon which relief can be granted.

Statement of the Case.

This action is one in condemnation and was filed by appellant in the Superior Court of Pima County, Arizona. Appellant seeks to take all the property of appellee which is devoted to public service for the purpose of supplying electric light, power, natural and artificial gas to the City of Tucson, its inhabitants, as well as to consumers located outside the City within the State of Arizona, within the area in which appellee is now operating.

Briefly the complaint [Tr. 1-20] alleges the municipal character of appellant, that it is situate in Pima County, Arizona, that appellee is a Colorado corporation transacting business within Pima County and the state of Arizona.

That appellee is distributing electricity and gas to appellant, its inhabitants, and consumers located outside the City.

That appellee is the owner of property located within the City as well as property located outside the City, in Pima, Pinal, Santa Cruz and Cochise Counties, Arizona, and all devoted to a public use.

The complaint describes every kind and character of property and interest therein, situated in these four counties, [T. R. 3-16.] That by virtue of the Charter of appellant, and the laws of Arizona, and particularly by Sections 27-901 and 27-906 A. C. A. 1939, appellant is authorized to condemn property of the character of that of appellee.

That the property sought to be condemned is to be used by appellant in supplying electricity and gas to the City of Tucson, its inhabitants, and consumers located outside the City of Tucson, within the state.

That the taking of the said property is for public use and such taking is necessary for the operation and maintenance of a municipally owned electric utility, and for supplying electricity and gas to the City and others within the state.

That the property is now devoted to a public use and that the public use to which appellant will apply the property is a more necessary public use.

That appellant purposes to finance the acquisition of the said property under the provisions of the Municipal Revenue Bond Act of 1943, Chapter 31, Laws of 1943.

That the Mayor and Council of appellant have duly passed and adopted a resolution declaring the said property is necessary to appellant for the uses above specified

and authorizing and directing the City Attorney to institute an action to condemn said property and declare title thereto.

A motion to dismiss the complaint on the ground that it failed to state a claim against appellee upon which relief could be granted was filed, and the action was removed to the Federal Court on the grounds set forth in Appellee's Statement of Jurisdiction, and thereafter the said motion was amended and additional grounds or points filed in support of the motion.

The motion to dismiss was granted by the District Court and no amendment being made to the complaint within the time provided, final judgment was entered dismissing the action.

Under three specifications of error appellant contends; First, that under the constitution and laws of the state and provisions of the City Charter, appellant is empowered to condemn the property described in the complaint for the purpose of operating and maintaining a municipally owned utility;

Second, that the complaint sufficiently sets forth the allegations required by the constitution and laws of the state to be contained in a complaint for condemnation of property.

Third, that the complaint is invulnerable against a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12 (b) of the Rules of Civil Procedure for the United States District Courts.

Two propositions of law are set forth in appellant's Brief, the first being based on specification of error No. 1, is to the effect that appellant has the right, power, and authority to acquire by condemnation the property of appellee. The second is based upon specifications of error Nos. 2 and 3, and is to the effect that the complaint contains sufficient allegations upon which the right of appellant to condemn the property can be adjudged, and that the complaint is invulnerable against a motion to dismiss under the above cited Rule 12, (b).

SUMMARY OF ARGUMENT.

Replying to Appellant's Proposition of Law I.

(a) Appellant Had No Authority to Institute an Action Against Appellee to Condemn Its Property.

Appellant's Charter, Par. 25 of Chapter 4 provides that no public utility shall be purchased, leased, or acquired by appellant without the assent of a majority of the taxpayers, who must be qualified electors of the City voting on the question at a general or special election at which such question may be submitted. No such election at the time of filing the complaint had been held granting this authority.

The complaint states that appellant proposes to finance the acquisition of the property pursuant to the provisions of the Arizona Municipal Revenue Bond Act of 1943. At the time of filing the action, no election under this law authorizing the acquisition of, and payment for, this property had been held.

(b) Court Had Jurisdiction Only of Pima County Property.

The court had jurisdiction only of appellant's property situate in Pima County, Arizona. An action seeking to take property by condemnation must be filed under the Arizona Eminent Domain Law in each county where the property is situated. The action was filed only in Pima County and, therefore, the court was powerless to find the value of the whole utility property or even that part in Pima County in relation to the values or parts of the property situated in the other three counties, Pinal, Santa Cruz and Cochise.

(c) Appellant Could Not Acquire Utility Property Located Outside City of Tucson.

The complaint shows that all of appellee's utility property sought to be taken is devoted to public use and the taking of that property outside the corporate limits of appellant, as held in *City of Phoenix v. Kasun*, 34 Ariz. 470, 97 Pac. (2d) 210, would constitute the taking of property in public use for private use, in violation of Sec. 27-907 of the Arizona Code, Annotated, 1939.

A municipal corporation in Arizona is not a public service corporation. Any utility operation by it without its limits is the operation of private service, without liability to serve, and with no right in the outside consumer to demand service in the absence of a contract with the municipality permitting such service. The court cannot render judgment permitting appellant to take any property devoted to public service and reduce it to private service.

Jurisdictional and Constitutional Questions Involved.

(a) No Adequate Method is Provided by Law for Valuation of Utility Property.

All proceedings for condemnation must be brought in the Superior Court of the county in which the property is situated as required by Section 27-909 of the Arizona Code. If carried to a conclusion, the condemnation of appellee's property would result in four different judgments as to four different parts of the operating property, without reference to their value as a whole.

(b) Valuation as of Date of Summons is Unconstitutional.

The taking of appellee's property at a value fixed as of the date of summons in the action would be in violation of Section 17 of Article 2 of the Arizona Constitution, in that appellee would be deprived of compensation for extensions or additions made to its property to render service required of it by law during period of litigation.

(c) Proposed Taking Violates Due Process Provisions of Both State and Federal Constitutions.

In addition to Eminent Domain Law failing to provide for just compensation, and the lack of provision for evaluating a unified operating public utility situate in more than one county, the owner of property taken by condemnation is forced, if he cannot obtain the value of the property fixed by judgment by levy or execution, to forego any further relief by annulment of the proceedings by the court, Section 27-918 of the Arizona Code, Annotated, 1939, so providing.

Replying to Appellant's Proposition of Law II.

(a) State Procedure Was Followed by Appellee.

The complaint was properly tested by motion to dismiss under the rule of Arizona procedure, Section 21-429, 1939 Code, which provides therefor. This motion under the state procedure, as in the Federal procedure, supersedes the general demurrer.

(b) Complaint Fails to State the Right to Condemn.

The complaint fails to comply with the requirements of Section 27-910 of the Arizona Code in that it fails to allege that appellant had taken the required steps under its Charter and the laws of the state precedent to the filing of the action, and further attempted to condemn property not subject to condemnation.

(c) Complaint Fails to Show Certainty of Compensation.

The payment for appellee's property sought to be taken by appellant has not been provided for in that the liability to compensate, as shown by the complaint, would not be a general obligation of appellant, and no other legal arrangement to provide compensation is alleged.

(d) Appellant May Not Condemn Utility Property Serving in Another Municipality.

The law does not provide for appellant to acquire that part of a utility property serving another municipality, as such acquisition would constitute an invasion of the jurisdiction of the other municipality, over its streets and alleys, and franchises.

ARGUMENT.

We shall proceed to argue appellant's Propositions of Law in the order set forth in its brief.

Replying to Appellant's Proposition of Law I.

Appellant Had No Authority to Institute an Action Against Appellee to Condemn Its Property.

Proposition No. 1 is to the effect that appellant has the right, power, and authority to acquire by condemnation the property of appellee as described in the complaint and involves specification of error No. 1 to the effect that under the constitution and laws of the state and the provisions of the City Charter, the power and authority to condemn the said property is given.

Section 16-602 to 16-605 inclusive of the Arizona Code Annotated 1939, are cited as expressly giving to municipal corporations, the authority to exercise the right of Eminent Domain to condemn utility properties, but it will be noted that Section 16-603 of the sections cited, and hereinafter set forth in the Appendix of this Brief, requires such acquisition of any public utility to be authorized by the affirmative vote of the qualified taxpayer-electors of the municipality before the municipality may proceed to acquire such property.

Sections 16-2601 and 16-2619 inclusive, of the same code, which is found in the June 1943 Cumulative Pocket Supplement, Volume 1, are also cited in support of appellant's contention, but it is to be noted that these sections which constitute the Arizona Municipal Revenue Bond Act of 1943, under which it is expressly stated in the complaint appellant is proceeding provide (sections 16-2603 to 16-2607 inclusive) for an election to authorize

the payment for such purchase or acquisition by the issuance of Revenue Bonds.

Appellant further cites Sections 27-901 and 27-906 to 27-916 inclusive, of the Arizona Code Annotated 1939. These sections constitute the major portion of the Arizona Eminent Domain Act, which do not confer the right upon a municipality to condemn property in its proprietary functions.

In addition to these statutory provisions, appellant cites certain portions of Chapter 4, Section 1, of the Charter of the City as conferring upon appellant the authority to condemn utility property under the Eminent Domain statutes of Arizona. These are sub-sections 4, 7, 22, 24 and 29 and do set forth the power of the City to condemn property for public use, however, in addition to these sub-sections cited by appellant, Section 25 of the said Chapter 4, p. 10, limits the exercise of these powers by providing: "that no public utility shall be purchased, leased, acquired, sold or in any manner disposed of, without the assent of a majority of the taxpayers, who must be qualified electors of the City, voting on the question at a general or special election at which such question may be submitted."

At the time of the filing of appellant's complaint in the Superior Court of Pima County, and the issuance of the Summons in the action, January 12, 1944, no election whatsoever had been held resulting in an authorization to the appellant to acquire by purchase or condemnation the utility property of appellee. Such an election was

jurisdictional and appellant had no authority to proceed in an attempt to condemn the property in the absence of authority by the taxpayer-electors of the municipality.

The Charter provision is as clearly binding upon the municipality as a state statute or a constitutional provision, for the Charter itself is the Constitution of the City and its provisions must be strictly followed in an attempt by the appellant to exercise the right of Eminent Domain to condemn utility property. It is said in *Town of Tremonton v. Johnson*, 49 Utah, 307, 164 Pac. 190, (reading page 191 syllabus 2):

“The general rule is that, where the statute prescribes the procedure or steps to be taken by a municipal corporation in exercising the right of Eminent Domain, the procedure prescribed by the statute becomes a matter of substance and must be strictly followed by the condemner as against the owner of the property sought to be condemned. It is further held that, where the statute prescribes certain steps to be taken before initiating condemnation proceedings, such steps are jurisdictional, and may not be disregarded.”

The Utah Court cites *Vreeland v. Jersey City*, 54 N. J. Law, 49, 22 Atl. 1052 as follows:

“Statutes conferring the power of condemnation under the right of Eminent Domain are strictly construed. Every condition prescribed by the Legislature in the grant must be complied with, and the proceedings to condemn must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential.”

In 2 *Lewis*, Eminent Domain, Par. 596, cited by the Court the rule is stated:

“When the taking is by a municipal corporation, it usually must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. No general rule can be laid down, except that the statute must be strictly complied with.”

It must be kept in mind that appellants complaint to condemn appellee's property was filed and the summons was issued in the action January 12, 1944. There appears in Appellant's Brief on page 5 under, Supplement of Statement of the Case, certain information for the use of this Court, not contained in the complaint in question, nor before the lower court, nor any part of the record in this case, that subsequent to the initiation of the appellant's action to condemn, that is, on February 28, 1944, a majority of the taxpayers of the municipality voted in favor of appellant acquiring the utility property of appellee described in the complaint and that on the same day, the Mayor and Council of appellant adopted a resolution ratifying the resolution referred to in paragraph 10 of appellant's complaint, and ratified and confirmed all acts, performed by the City Attorney and other officers and agents of appellant in pursuance thereof. In the Appendix of Appellant's Brief is contained extracts of the minutes of a meeting of the Mayor and Council, and the resolution ratifying resolution 1956 of the Mayor and Council adopted one month and fifteen days after the filing.

While counsel for Appellee do not understand how this Appendix becomes part of the record in this case, it appears nevertheless. Its purpose is to relate authority back to the date of the filing of appellant's suit and provide *nunc pro tunc* for the initiation of the action.

Appellee's conception of the law is that the right to sue must exist at the time of filing of the suit. Under either the appellant's Charter or the laws of Arizona, an election is a prerequisite to the condemnation of utility property by appellant, and whether it be that public notice be given of the municipality's intended taking, or the adoption of a proper ordinance for that purpose, or the holding of an election to authorize the municipality to condemn, such primary steps must be taken prior to the filing of a condemnation action, as a matter of jurisdiction. Such steps taken after the initiation of the suit cannot relate back to, nor breathe life into, the premature attempt to take private property for public use.

The case of *Suburban Investment Company v. City of Atlanta, et al*, 148 Georgia 593, 97 S. E. 542, is one where the City Charter of Atlanta provided for the exercise of the city of the power of Eminent Domain. In the Georgia case an ordinance was required before the right could be exercised. The City of Atlanta attempted to proceed under its Charter to condemn private property for sewer purposes before an ordinance was passed for that purpose, and the Suburban Investment Company petitioned to enjoin the City from proceeding. The lower court refused to grant an interlocutory injunction and from the judgment refusing the injunction the Investment

Company appealed. The Supreme Court of Georgia, in passing upon the case, said:

“The question presented for decision is whether the city of Atlanta can proceed under its charter to condemn private property for sewer purposes before an ordinance is passed for that purpose. In the instant case, the ordinance was passed after the offer to buy the right of way from the owner was made, and the notice required was given. This cannot be done so as to make such an ordinance effective. The ordinance must be first passed, and it cannot be subsequently enacted and made to relate back to the beginning of the proceedings to negotiate for the purchase of the right of way. *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624, 10 L. R. A. (N. S.) 909 (5, 6).”

The case of *Paris Mountain Water Co., v. City of Greenville*, 105 S. C. 180, 89 S. E. 669, involves an injunction proceeding brought by the water company against the city to enjoin the latter from proceeding to condemn the water company's property. The Constitution of South Carolina authorized cities and towns to construct or purchase water works upon a majority vote in favor thereof, and provided that:

“No such construction or purchase shall be made except upon a majority vote of the electors in said cities and towns who are qualified to vote on the bonded indebtedness of said cities and towns.”

The Court said:

“There has been no election. The right to purchase is based upon a vote and if ‘purchase’ means ‘condemn’, then there can be no condemnation, ex-

cept upon a vote. It is said the voter wants to know the price before he votes to buy. The first vote simply gives power to purchase. It binds no one to buy. He has the right to refuse to buy when he votes for or against the bonds. The voter is not bound to vote for the bonds after he learns the price. If a man wants a piece of property, then he considers the price. If he does not want it, the price does not affect him. That is the logical order, but whether it is logical or illogical, desirable or undesirable, a vote is necessary before a municipality can bind itself by a contract of purchase, or the 'owner' by condemnation. When a man calls upon a court to enforce a right that he has not now, but hopes to have in the future, the courts should say to him, 'When your right accrues, it will be time enough to seek its enforcement'."

It is also prerequisite to appellant's right to condemn utility property that an election be held under the 1943 Revenue Bond Act to invoke the jurisdiction of the Court. If appellant as it declares in its complaint [Tr. 19, par. IX] intends to finance the acquisition of appellee's property under this Act, it must comply with the statutory requirements thereof. In *Town of South Tucson v. The Tucson Gas, Electric Light & Power Company, a Corporation*, No. 10921 Fed. (2d), this Court held that:

"To invoke the jurisdiction of the superior court, the statutory requirements of the Municipal Revenue Bond Act of 1943, with which the complaint must allege compliance, are

'16-2603. Powers of municipalities.—in addition to any powers it may now have a municipality shall

have power: (to) acquire, by . . . the exercise of the right of eminent domain, any utility undertaking or part thereof, and acquire in like manner land, rights in land, or water rights in connection therewith; 2. to issue its bond to finance the cost thereof. . . .’

‘16-2604. Vote on bond issues.—Questions of bond issues under this act shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose, as provided in this act!

‘16-2605. Election resolution.—(a) The governing body shall adopt an election resolution calling an election upon the question of the issuance of bonds. Such resolution shall state in substance: 1. the maximum amount of bonds to be issued; 2. the purpose for which the bonds are to be issued’.”

We believe the filing of the action to condemn by appellant was premature. Because of its noncompliance with the Charter requirement that an election be held resulting favorably to its acquiring utility property, it had no authority to acquire the property by any means at the time suit was filed. And further, even had such an election been held authorizing the acquisition of a property by appellant, a further election was required, under the Arizona Revenue Bond Act of 1943. There was in existence at the time of the initiation of the condemnation action, no authority granted by the general taxpayer-electors under the Charter, nor by the real property taxpayer-electors under the Revenue Bond Act, for appellant to proceed to condemn appellee’s property.

Court Had Jurisdiction Only of Pima County Property.

It must be kept in mind that appellant, as plaintiff in the lower court, was attempting to condemn all of appellant's property used or useful in supplying and distributing electric light and power and artificial and natural gas within the State of Arizona. Paragraph VI of the complaint [Tr. pp. 17, 18] states:

“That the property and interests in property above described plaintiff believes it to constitute all of the property of the defendant used or useful for the purpose of supplying and distributing electric light and power and artificial and natural gas to the City of Tucson and its inhabitants and to the consumers located outside of the City of Tucson and within the State of Arizona within the area in which the defendant is now operating and supplying such commodities and services.”

Appellant further alleges [Tr. p. 3]:

“That all of said property and interests in property is devoted to a public use and is used or useful by the defendant in supplying electricity and natural and artificial gas to said City of Tucson, and its inhabitants, and to said consumers located outside of the City of Tucson and within the State of Arizona.”

Appellant then described the property and interest in property [Tr. pp. 3-17, incl.] and includes all property of every description owned, operated or controlled by appellee in its public utility business in four counties.

The complaint does not segregate the property situated in one county from the property situated in another county, except as to some parcels of real estate, but seeks to condemn the property as a whole and not any part thereof.

The Superior Court of Pima County has no jurisdiction to ascertain the value of appellee's property in Pinal County, Santa Cruz County and Cochise County. The Arizona Statute of Eminent Domain requires that the action must be brought in the county where the property is situated. Section 27-909, 1939 Arizona Code, Annotated, provides:

“All proceedings for condemnation must be brought in the Superior Court of the county in which the property is situated in the same manner as other civil actions. . . .”

The complaint shows that the property is an integrated system and could not physically be separated in each county because the court in each county would be utterly unable to find the value of property in other counties connected with and operated as a whole going public utility. The court of any one of these counties could not ascertain the severance damages, when it has jurisdiction to ascertain the value of the property only in one county. The value of, and damages to, such a utility property would be impossible of ascertainment, in whole or in part, under the Arizona Law.

Appellant Could Not Acquire Utility Property Located Outside City of Tucson.

It will be noted that appellant pleads, in paragraph VIII of its complaint, [Tr. pp. 18-19]:

“That the above described property is now devoted to a public use and that the public use to which it is sought to be applied by the plaintiff is a more necessary public use.”

Arizona Law of Eminent Domain is contained in Article 9, Sections 27-901 to 27-921, Arizona Code, Annotated, 1939. Sections 27-907 reads as follows:

“Uses for which may be taken.—Before property can be taken, it must appear that the use to which it is to be applied is a use authorized by law; that the taking is necessary to such use, and, if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. (R. S. 1901, Sec. 2451; 1913, Sec. 3078; R. C. 1928, Sec. 1335.”

If appellant were permitted to condemn the utility property of appellee, exclusive of all such property situate or located in the City of Tucson, it would thereby reduce all the property condemned, with the exception of that part of the property within the confines of appellant's municipality, to private use. It would take away from the consumers outside the City of Tucson the right to demand public service of gas or electricity. The city would have no obligation to serve outside its corporate limits.

The Arizona Supreme Court, in the case of *City of Phoenix v. Kasun*, 34 Arizona 470, 97 Pac. (2d) 210, has announced the principles governing the operation of public utilities by municipal corporations. This was an action by the plaintiffs on behalf of themselves and others similarly situated against the City of Phoenix to enjoin the city from passing an ordinance increasing water rates to be paid by consumers outside the city limits. The court laid down certain rules governing municipal corporations operating public utilities both within and without their corporate limits, as follows:

“(a) A municipal corporation has a right to furnish water through its municipal water plant to consumers without, as well as within, its corporate limits,

“(b) While furnishing water in this manner the state corporation commission has no jurisdiction to regulate its actions towards consumers, whether inside or outside of such limits;

“(c) The legislature is the only body which has the right to regulate the rates charged by a municipal corporation operating a public utility, and it has plenary power in that respect except as limited by the Constitution;

“(d) A municipality may not compel consumers outside of its corporate limits to purchase water from it, nor can it be compelled to furnish such water to non-residents;

“(e) A municipality can only dispose of its surplus water outside of its corporate limits subject to the prior right of its inhabitants in case of shortage.”

Among other things, the Arizona Supreme Court, in speaking of public use, said:

“The distinguishing characteristic of a public utility is the devotion of private property by the owner

to such a use that the public generally, or at least that part of the public which has been served and has accepted the service, has the right to demand that such service, so long as it is continued, shall be conducted with reasonable efficiency and under proper charges. When the property is thus devoted to the public use, certain reciprocal rights and duties are raised by implication of law as between the utility and the persons whom it serves, and no contract is necessary to give them. Inasmuch, therefore, as one who devotes his property to a use in which the public has an interest, in effect grants to the public an interest in the use thereof, he must submit to being controlled by the public for the common good to the extent of the interest thus created and so long as such use is continued. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. The right inherent in the public authorities to control the rates to be charged by those operating public utilities is based on the fact that they owe a legal duty to the public to furnish certain services and can, therefore, be regulated by the public as to the price to be charged for such services. It is upon these basic principles that the entire superstructure of public regulation of public utility corporations is based.

“But the fact that a business or enterprise is, generally speaking, a public utility does not make every service performed or rendered by those owning or operating it a public service, with its consequent duties and burdens, but they may act in a private capacity as distinguished from their public capacity, and in so doing are subject to the same rules as any other private person so acting. *Killam v. Norfolk, etc. R. Co.*, 122 Va. 541, 96 S. E. 506, 6 A. L. R. 701. Since the basis of the right of regulation is that a duty is owed the public, regardless of contract, it

follows as a corollary that when the duty which arises is based purely on contract and not on law, express or implied, the situation is governed by the rules applying to private contracts in general, notwithstanding that one of the parties may be operating a public utility.”

From the case of *Childs v. City of Columbia*, 87 S. C. 566, 70 S. E. 296, the Arizona Supreme Court quoted the following language:

“ ‘Evidently the complaint is framed on the theory that the City of Columbia is to be considered, with respect to the contract alleged, as if it were a private business corporation, bound by any contract made by the city authorities to furnish water beyond the city limits. Counsel for appellant has submitted an elaborate argument supported by many authorities in support of that theory. Assuming the correctness of this position, it does not by any means follow that the city occupied toward the plaintiff, a nonresident, the relation of a public service corporation, under obligation to contract with him for his water supply at a reasonable rate without discrimination.

“All powers and privileges conferred by the Constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced in the municipal boundaries and for the benefit of the inhabitants of the municipality, unless the Constitution or statute expressly provides that such power and privileges may be exercised beyond the corporate boundaries, or for the benefit of non-resident. * * *

“ ‘Assuming that the city authorities had the power to contract with the plaintiff to furnish water for his residence and other houses, and that the duty devolves on them of contracting for the sale of any

excess of the city's water supply beyond the municipal needs and the needs of its inhabitants, it is, nevertheless, perfectly obvious that the duty to sell the excess of its water supply did not import an obligation to make a contract with any particular person at a reasonable price; but, on the contrary, did import an obligation to sell its surplus water for the sole benefit of the city at the highest price obtainable. It was a duty not owed to outsiders, but exclusively to inhabitants and taxpayers of the city. *It follows that the plaintiff as a mere non-resident had no rights whatever against the city, except such as he may have acquired by contract. In other words, the city was under no public duty to furnish water to the plaintiff at reasonable rates or to furnish it at all, and to obtain the injunction the plaintiff must show that the city is about to violate its contract with him.'"* (Italics our.)

The court stated that after a careful consideration of all the authorities, it was of the opinion that the controlling factors in the case were that the city was under no obligation as a matter of law, to furnish any service to the plaintiffs; that the relationship between them was purely contractual in its nature, and reversed the holding of the lower court, which had granted a temporary injunction against the city.

It follows from this case that any service of a utility by a municipality outside its confines is gratuitous; that the consumer who has a right to demand service from a public service corporation loses that right if the utility property is acquired by a municipality, and that the obligation to use the plant or system for public service has been terminated upon acquisition of it by a municipal corporation, outside its corporate limits.

Certainly the use for which this property, already appropriated to a public use, with the possible exception of that located within the appellant's corporate limits, is not sought for a more necessary public use. The bulk of the property, as reflected by the description of it in the complaint [Tr. pp. 3 to 17, incl] would be reduced to private use subject to such contracts for service as the municipality might wish to make, and the utilities delivered at whatever rate the municipality might wish to charge.

It was the province of the lower court to decide whether the property of appellee was sought to be taken by appellant for a public or private use.

Section 17 of Article 2 of the Constitution of the State of Arizona (Page 72 Arizona Code, Annotated, 1939) provides:

“Eminent Domain.—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use

alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”

True, Section 16-2603 of the Arizona Code, Annotated, 1939, provides that a municipality may acquire within or without its corporate limits any utility undertaking or any part thereof, but the provisions of that section must be read in the light of Section 17 of Article 2 of the Arizona Constitution, just cited, which provides that private property shall not be taken for private use, and also Section 27-907 of the Code, being part of the chapter on Eminent Domain, hereinbefore cited, which further provides that if the property sought to be taken is already appropriated to some public use, the public use to which it is to be applied must be a more necessary public use.

Where the only obligation of a municipal corporation, operating a utility, is to its own citizens or residents, in the absence of contractual obligations which it might enter into, and where it has no duty to furnish services to non-residents of its municipality and can only dispose of its surplus services or products outside of its corporate limits, subject to the prior right of its inhabitants in case of shortage, unquestionably the only public service rendered by such municipality is wholly and solely within its own borders and existing nowhere else.

Further, a municipal corporation in Arizona is not a public service corporation. Section 2 of Article 15 of the Constitution of Arizona (p. 196 Arizona Code, Annotated, 1939) clearly defines public service corporations as follows:

“Public Service Corporations.—All corporations other than municipal engaged in carrying persons or

property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.”

The Arizona Corporation Commission, the regulatory body of Arizona, under Section 3 of Article 15 of the Constitution of the State, has full power to regulate public service corporations within the State (P. 197 Arizona Code, Annotated, 1939), the pertinent part of that section being as follows:

“Powers to regulate rates, service.—The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations. * * *”

The Corporation Commission has no such power over municipal corporations and their services. Their rates are unsupervised and uncontrolled, the sole power of regula-

tion being in the Legislature, and there does not exist today and may never exist in Arizona any regulation, supervision, or control of a municipality's utility operations.

It has been held that the sole power of regulation of municipalities in the Legislature and any attempt to delegate to the Corporation Commission is void. (*Menderson v. Phoenix*, 51 Ariz. 280, 76 Pac. (2d) 321; *Phoenix v. Wright*, 52 Ariz. 227, 80 Pac. (2d) 390.).

The private corporation is required by law to serve all persons or corporations within its territory with the utilities it produces or distributes. The private corporation is regulated by law and by the orders and directions of the Arizona Corporation Commission as to the character of its service and as to its charges therefor. The private corporation must serve the consumer within the territory in which it operates and must serve such consumer in the manner and at the rates prescribed by the state through its regulatory commission. It has that obligation and the consumer is vested with the right to demand the service. A municipal corporation has no such obligation either within or without its corporate limits.

While a municipality might well be acquiring property within its corporate limits for a public use or purpose, certainly it cannot be said that it is furthering a public purpose in taking over utility property outside the corporate limits already applied to a public use that is obligatory upon the operator of the utility and changing the service into one that may or may not be made or, if made, may

not be continued as the officers of the municipality may decide.

The public use for which the right of eminent domain may be granted must be one for a public utility which the public has the right to share impartially and one generally recognized by settled practice as a fit purpose for the exercise of the power of condemnation. (*Homes Electric Protective Company v. Williams*, 228 N. Y. 407, 127 N. E. 315.).

We think the true definition of public use has been stated most clearly in the case of *Allen v. Railroad Commission*, 179 Cal. 68 (88), 175 Pac. 466 (474), as follows:

“That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted so long as it is continued with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and every individual member of it, as a legal right. Such is not only the accepted significance of the phrase, by the great weight of authority as expounded by Mr. Lewis (*Eminent Domain*, Sections 164, et seq.), but is the definition repeatedly announced by this court.”

We contend that the taking of utility property of appellee in all that territory outside the municipal limits of appellant would constitute the taking of private property for private use in violation of Section 17 of Article 2 of the Constitution of the State of Arizona, hereinbefore cited.

Jurisdictional and Constitutional Questions Involved.

No Adequate Method Provided by Law for Evaluating Utility Property.

As to the provision of the Eminent Domain law pertaining to method of fixing the valuation of property sought to be condemned, Sec. 27-909 of the Code, hereinbefore cited, provides:

“All proceedings for condemnation must be brought in the Superior Court of the county in which the property is situated in the same manner as other civil actions”

To condemn the utility property of appellee, appellant would be required to file an action in each of the Superior Courts of Pinal County, Cochise County, Santa Cruz County, and Pima County in an attempt to fix the compensation and damages, as appellant's property is situated in all these counties [Part Six of Complaint, T. R. pp. 14; Sec. 4 of Part Seven, T. R. p. 16], which include a transmission line sixty-seven miles in length in Pima and Santa Cruz Counties [T. R. p. 14] and certain transmission lines and distribution systems serving various consumers designated in the Complaint [T. R. p. 16].

The foregoing property constitutes the electrical utility of appellant and, in addition, there is included the gas utility consisting of the transmission line and distributing system located in both Pima and Pinal Counties [T. R. p. 16, Sec. 3 of Part Seven of the Complaint].

Appellant's property cannot mechanically or otherwise be divided into four parts for valuation for the ascertain-

ment of compensation and damages for the taking, even had appellant filed an action in each of the counties where the property is situate. So to begin with, the Eminent Domain law of Arizona does not provide any due process of law nor confer jurisdiction in any court to ascertain the just compensation to which appellant would be entitled for the taking of its property by condemnation.

Appellant's utility property, both gas and electric systems, constitute a going business as alleged in the Complaint in Paragraph VI [Tr. p. 18], and on the face of the situation, it is clearly apparent that no one court can take into its hands that part of the property located within its particular jurisdiction and fix the damages and compensation without reference to the whole. Further, the Arizona statute of Eminent Domain provides only for the ascertaining of the value of and damages to real estate and its appurtenances. This is clearly apparent from the language of Sec. 27-915 of the Arizona Code Annotated, 1939:

“Value, damages, and benefits to be found.—The court or jury shall ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consist of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitute only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion

sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit be equal to the damages assessed, under subdivision two of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, the cost of cattle guards where fences may cross the line of such railroad. As far as practicable, compensation must be assessed for each source of damage separately. [R. S. 1901, Sec. 2459; 1913, Sec. 3087; rec., R. C. 1928, Sec. 1343.]

No provision is made by this law for the ascertainment of value of any property other than real estate and interests therein.

In the case of *Lone Star Gas Company v. Fort Worth*, 128 Texas 392, 98 S. W. (2d) 799, the court said:

“If it be found, then, that eminent domain proceedings are void when undertaken under a statute conferring the power but not making suitable and adequate provisions for the ascertainment of compensation and the payment thereof, there can be no question that injunction to restrain a threatened taking under such proceeding is proper. *Ft. Worth Improvement District v. Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 170, 48 L. R. A. (N. S.) 994.”

A very apt statement of the rule is set forth in the case of *Watauga Water Company v. Scott*, 111 Tenn. 321, 76 S. W. 888, 889, in the following language:

“It is a fundamental principle of the law of eminent domain, and the taking of property for public use, that it can only be done by making just compensation to the person whose property is taken, for its reasonable value; and any legislation which confers the right of eminent domain can only be valid upon condition that such compensation is provided for, and the mode and manner of ascertaining and enforcing the same is fixed and established.”

We believe that the Arizona statute of eminent domain was designed and intended to establish procedure only in the case of the taking of real estate and interests therein or appurtenances thereto, and by the very terms of Sec. 29-915 of the Code, herein cited, a court or jury is limited to such values.

Valuation as of Date of Summons Is Unconstitutional.

We have discussed the question of taking appellant's property for private use and while we shall only by reference call the court's attention to that point, the taking for such use is clearly in derogation of the constitutional prohibition referred to herein.

Section 17 of said Article 2 of the Arizona Constitution provides that “no private property shall be taken or damaged for public or private use without just compensation having been made or paid into court for the owner . . .”

The compensation and damages provided in the Eminent Domain Act are defined by Section 27-916 of the Arizona Code, Annotated, 1939, as follows:

“Damages and value fixed from date of summons.
For the purpose of assessing compensation and dam-

ages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation and damages. If an order be made letting the plaintiff into possession prior to final judgment, the compensation and damages awarded shall draw legal interest from the date of such order. No improvements placed upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages.”

It will be noted that the actual value at the date of the summons shall be the measure of compensation and that no improvements placed upon the property subsequent to that date shall be included in the assessment of compensation or damages.

The complaint in this action was filed January 12, 1944 and the summons was served January 15, 1944 [Tr. p. 21]. All that appellee might receive were the action carried to judgment for appellant would be the value of the property as of January 12, 1944. Appellee is operating all the property described in the complaint as a public utility and is under the jurisdiction, orders and regulations of the Arizona Corporation Commission to extend its properties whenever public convenience and necessity require. In the normal operation of its business over a period of months and years, capital additions are inevitable, whether by order of the commission or not. Extensions, new connections, and the installation of additional equipment and material are vital and necessary to a going public utility.

Were this action one to condemn real estate only, the interest therein and appurtenances, no burden or obligation would be upon the owner, unless he were conducting public service, to add anything to the value of the prop-

erty during the period of litigation, and the provision of the Arizona Constitution, requiring just compensation to be paid, would, in that event, be observed and complied with.

The owner of a public utility property receives no interest upon the amount of the value found, although the property may be taken months or years after the initiation of the action. Interest runs only from the date of the judgment. Section 34-128 of the Arizona Code, Annotated, 1939, provides:

“The Clerk shall include in the judgment entered by him the costs and interest on the verdict from the time it was rendered.”

So, it is most evident that in an action to condemn property, the operator of a public utility in Arizona may hold his property under the cloud of the action for a very long period of time and then if the property be finally taken, he is deprived of the value of necessary additions and betterments made to that property to carry out his obligations as an operator rendering public service.

We submit that the Arizona law of eminent domain, when applied to the taking of lands, provides for just compensation to be made in compliance with the Arizona Constitution, but when applied to the acquisition of a public utility business, presents a vastly different situation.

The Court of Errors and Appeals of New Jersey, in the case of *Passaic Consolidated Water Company v. McCutcheon, Clerk, et al.*, 105 N. J. L. 137, 144 Atl. 571, passing upon an identical situation, has held that a law, requiring the value of a public utility company's property to be fixed as of the date of filing of a condemnation com-

plaint, is insufficient to afford a privately owned public utility company a full and complete method for the obtaining of just compensation for its properties, rights and franchises, in that it fails to provide any method of compensation for extensions, betterments and improvements, as it may be obliged to make to its property during the pendency of the condemnation proceedings to render adequate service as a public utility, and this court held that the owner of a public utility property is not required to submit its property to such jeopardy, that it must be afforded a remedy to which it can resort of its own motion to obtain just compensation, and that as an owner of public utility property, it shall not be obliged to have its property subjected to condemnation under such statutes. The New Jersey Circuit Court of Appeals reaffirmed this opinion in the case of the *New Jersey Water Service Company v. Borough of Butler*, 105 N. J. L. 563, 148 Atl. 616.

Proposed Taking Violates the Due Process Provisions of Both the State and Federal Constitutions.

It is clearly apparent from the record that no order has been made letting appellant into possession prior to final judgment so that any compensation and damages would draw legal interest from the date of such order, as provided in Section 27-916 of the Arizona Code, Annotated, 1939, hereinbefore cited. Appellee is receiving nothing which it would not otherwise be entitled to in the absence of any action to condemn its property; and, further, appellee is not afforded due process of law or just compensation for its property if it be compelled to add to its property during the period of litigation, and receive no compensation therefor, but being compelled to turn over the property as added to and extended for a value fixed months or even years before the date of the final judgment. The

due process clause of the Constitution of the United States, Section 1 of Article 14 reads:

“Citizenship—Due process of law—equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The provision of the Arizona Constitution in this respect, being Section 4 of Article 2 of said Constitution reads:

“Right to life, liberty, property.—No person shall be deprived of life, liberty, or property without due process of law.”

Certainly this due process is not afforded by permitting a municipality to becloud the property of a public utility operator for a long period of time without any assurance that it eventually will be taken by the municipality, even for payment based upon the value of the property at the date the litigation was initiated. Its development and services should remain static during all of this time, any opportunity to dispose of the property to another purchaser sacrificed on account of the pending condemnation action and perhaps eventually the property, even if judgment be entered in favor of the municipality, left where it has always been, in the hands of its private owner.

Section 27-917 of the Eminent Domain Act (p. 506, Arizona Code Annotated, 1939) provides that “the plaintiff must within thirty days after final judgment pay the

sum assessed * * *.” Section 27-918 of the Code provides that “payment may be made to defendants entitled thereto or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil action; and if the money cannot be paid upon execution, the court, upon a showing to that effect, must set aside and annul the entire proceeding * * *.”

No showing has been made in this matter concerning the ability of appellant to pay for the property. It is inconceivable that an execution against the appellant-municipality, were the amount of the value and damages not paid by the appellant within thirty days after final judgment, could even be resorted to on account of it being a municipality, and even could such execution be resorted to that the amount of money fixed by the court could be obtained.

Virtually all the property of municipalities in Arizona is exempt from execution. Section 24-601 of the Arizona Code, Annotated, 1939, provides:

“The following property shall be exempt from execution, attachment or sale on any process issued from any court:

“21. * * * and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining owned or held by any town or city or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state. [R. S. 1913, Sec. 3302; rev., R. C. 1928, Sec. 1738.]”

Further, the courts are practically unanimous in holding that funds or credits of a municipality, acquired by it in its governmental capacity, may not be reached by its creditors by execution under a judgment against municipality, or by garnishment served upon the debtor, or depository of the municipality. *Vanderpoel v. Borough of Mt. Ephraim in the County of Camden*, 111 N. J. L. 423, 168 Atl. 575). Attention is called to copious annotations under "Levy on Municipal Funds" following the cited case in 89 A. L. R. 863-870.

Replying to Appellant's Proposition of Law II.

Counsel for appellee has argued several matters of law replying to Proposition of Law I which could just as well have been argued under either Proposition, but in replying to Proposition of Law II advanced by appellant that the complaint contains sufficient allegations to warrant condemnation of appellee's property, and is invulnerable against a motion to dismiss under the federal rules, we wish to make some brief observations.

State Procedure Was Followed by Appellee.

The filing of a motion to dismiss was proper procedure either under Rule 12 (b) of the United States District Courts or the rule of Arizona procedure, Sec. 21-429, 1939 Arizona Code Annotated, they being identical.

Section 21-429 is set forth in the Appendix of the Brief, for the court's information.

The Arizona procedure also provides that the defense of failure to state a claim upon which relief can be granted can be made by a later pleading, or by motion for judg-

ment on the pleadings or at the trial on the merits, and that also, whenever it appears by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action, Sec. 21-436 A. C. A. (See Appendix.)

Complaint Fails to State Right to Condemn.

The allegations of the complaint are not sufficient to warrant the court in granting the relief which appellant seeks, for, while municipalities may generally have the power of condemnation they may not exercise such power until the steps necessary for such exercise have been properly taken. In this instance, both the Charter of the City and the laws of the State require an election by the taxpayer-electors of the City to authorize the taking of utility property, and the complaint fails to allege that any such election has been held. By such omissions, appellant has failed in that respect to comply with the requirements of Sec. 27-910 of the Arizona Code requiring that the complaint shall state the right of appellant to condemn.

The only authority cited by appellant in support of its contention that an election is not prerequisite to its right to institute a condemnation (App. Br. 14) is *Public Service Co. v. City of Loveland*, 79 Colo. 216, 245 Pac. 494, which holds (syllabus 11):

“As to the next point raised by counsel for the company, that condemnation proceedings by the city must first be authorized by a vote of the taxpayers, this is sufficiently replied to by the complete silence of the statute, which does not require such vote.”

Complaint Fails to Show Certainty of Compensation.

The failure of the complaint to allege authorization by election to condemn appellee's property also discloses the inability of appellant to assure appellee compensation for its property sought to be taken. If the question of appellant's authorization to issue revenue bonds with which to pay for appellee's property is submitted to its citizens, no authorization at all may be given, or no authorization of an amount sufficient to compensate defendant for its property may be granted. The complaint shows no ability in appellant to compensate defendant for its property. We think this is fatal to its right to condemn.

The liability to compensate appellee for its property is confessedly not to become a general obligation of appellant. The complaint specifically declares that appellant is proceeding under the Revenue Bond Act. The financing of the acquisition of the property is wholly speculative and uncertain, both as to whether revenue bonds in any amount will ever be issued and whether the amount of the bonds, if issued, will be sufficient to compensate appellee for the value of its property.

“Laws failing to provide the property owner with an adequate remedy for the enforcement of the payment of damages are violative of the state and federal constitutions, prohibiting the taking of private property without just compensation.”

Wright v. Donaldson, 144 Tenn. 239, 230 S. W. 605.

“The purposes of the Constitution are to place the citizen in a position to demand and receive compensation; that the enabling statutes shall point out the persons who shall pay the compensation, and at the same time furnish the remedy for the enforcement of that payment. None of these things are done by the eighth section of the act, and it is therefore unconstitutional and void.”

Tuttle v. Knox County, 89 Tenn. 157, 14 S. W. 486.

“It is said that the court is not concerned with the legality of bonds in this case, and that subsequently an ordinance could be passed and submitted after the value of the plant was ascertained. The statute, however, provides a method, which is that a ‘plan and system’ must be adopted, and the estimated value to be expended, and the payment, the Supreme Court, *supra*, says is a part of the plan. This court must adjudicate the necessity, and also, *prima facie* at least, the qualification under the statute of the plaintiff to exercise the right, and if it is apparent upon the face of the complaint that the requirements of the statute and the decisions of the state Supreme Court have not been complied with or conformed to, the court would not do an idle thing and proceed in the cause.”

City of Bremerton v. North Pacific Public Service Co., 243 Fed. 980 (1913).

Appellant May Not Condemn Utility Property Serving Another Municipality.

Appellant states on page 4 of its Brief that the operations of appellee within the City of Tucson are conducted under a franchise from appellant, and that the operations of appellee outside the City are being conducted without franchise from any municipality or other consumer. We grant this.

However, by judicial notice, and by virtue of action Civ.—226—Tucson, in the lower court, (*Town of South Tucson v. The Tucson Gas, Electric Light & Power Co.*) and being No. 10921 on appeal in this court in which judgment was rendered June 12, 1945, it is clearly apparent to the court that a portion of appellee's property is located in the Town of South Tucson, Pima County, Arizona, and is used to supply electricity and gas to said Town. The Town is a municipality within the area served by appellee and as such, has exclusive jurisdiction over its streets and alleys and franchises for public utilities within its confines.

It is appellee's position that neither the 1943 Revenue Bond Act of Arizona nor any other law of the state of Arizona, has empowered one municipality to condemn utility property in another municipality, whether operating under franchise or not.

We think the case of *Spear v. City of Bremerton*, 90 Washington 507, 156 Pac. 825 (826) presents a clear statement of the law, as follows:

“The next question, whether the city of Bremerton can purchase and maintain a distributing system in

the city of Charleston, or acquire the franchise heretofore owned by the Bremerton Water Company (Garrison-Fisher Company), is of more consequence. We are of the opinion that it cannot. The power is not within the terms of the several acts to which reference has been had, and it is certainly not within the necessary implications of any of them. The purpose of the law is plain. It is to give a city the power to acquire, by purchase or otherwise, a water system for the benefit of its own inhabitants, and the power, pending a use by its inhabitants, to dispose of any surplus. The power to sell the excess is incidental to the main purpose; that is to say, a city can develop a plant, or purchase an existing plant, and, whichever its method may be, it can reasonably anticipate the future and develop or purchase more than enough to supply its present needs. The statute does not authorize, even by the remotest implication, one city to take over a distributing system in another city. To supply water to the inhabitants of a city is a municipal function. It is to be controlled by the city using it, and not by the city selling it, and, notwithstanding it is said that the city of Charleston, through its council, has endorsed this proceeding, and waives its reserved right under the franchise in favor of Bremerton, and notwithstanding the power of Bremerton to sell its surplus to the city of Charleston, it cannot invade, or take away, the power and the duty of the council of Charleston to deal with its own inhabitants directly, and not through the instrumentality of another, in the exercise of every function committed to it by the Legislature."

And the court continues [p. 827]:

“Another reason, or rather an argument in favor of the one reason, is that the streets and alleys of the city of Charleston belong to it. It is charged with the duty of improving them and keeping them in repair. It, and it alone, can regulate and control their use, and to permit another city to maintain, repair, and extend mains throughout the city would rob it of one of its most important functions.”

We think the same rule obtains in Arizona, for in the case of *Long, et al., v. Town of Thatcher, et al.*, *Ariz.* 153 Pac. (2d) 153, it is held that a town's purchase of utility property serving another municipality is unconstitutional and void. The court states [156]:

“The rule was changed or attempted to be changed by the bond act of 1943. The Town of Thatcher has accepted the offer under that act, and, by a vote of the taxpayers and qualified electors thereof, has obtained permission and authority to issue its bonds for the cost of the ‘utility undertaking’ (including improvements or extensions thereafter constructed or acquired), supplying it and Safford with power, and thereby acquire title to such utility, not only that part located within the limits of Thatcher but also the portion located within the limits of Safford. These bonds, under the law, are issued as the obligation of Thatcher but they and the interest thereon, it is provided, shall be paid out of the revenue collected from the users and patrons of the light and power plants wherever located. By this operation that portion of the light and power plant located in and supplying the residents of Safford is taken from Safford and given to Thatcher without any compensation what-

ever. Something like 80% of the income from the power plant is paid by the patrons of the Safford plant for which it gives service but obtain no interest in the property of the plant, the title thereto being lodged in Thatcher.”

“This is a kind of action the law cannot and does not approve or tolerate. It is taking the property of the Safford plant without compensation first being made, which violates section 17, of article 2, of the state Constitution. It takes away from Safford the right to control its streets and to issue a franchise to a power plant to furnish light and power to its citizens, and gives it over to a neighboring municipality.”

We do not contend, of course, that the major part of appellee’s property is located in and serving the Town of South Tucson, but we do contend that some substantial portion of the property is there located and serving, and that under the rule laid down in the case of *Town of South Tucson* against appellee herein, which was recently announced by this court, appellant cannot sue for all the utility property under a Resolution that all be acquired and then be permitted to condemn a part of such utility property, even though it be the greater part thereof, for as said by this court:

“We are of the opinion that the allegations of the Town’s complaint show that it has not complied with the requirements of the statute with regard to the resolution describing the properties sought to be condemned and thereafter paid for by the bonds, and that under the cases about cited the defect goes to the essence of the municipal ownership legislation.”

Conclusion.

We respectfully submit that the lower court committed no error in dismissing the complaint in condemnation against appellee, for the reasons hereinbefore set forth. Said court was powerless to grant any relief to appellant, and the judgment dismissing the action should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

APPENDIX.

Chapter IV, Par. 25, Charter, City of Tucson, Section I. The City shall have power:

“(25) To lease to persons, firms or corporations for the purpose of maintenance, operation or use, any public utility owned or controlled by the City, and to provide for the leasing of any lands now or hereafter owned by the City, except lands donated, purchased, or used as public parks or playgrounds; provided, that any such leases shall be made only to the highest bidder therefor by ordinance duly adopted, and provided, further, that any and all bids for any such lease may be rejected at the discretion of the legislative body of the City; provided, that no public utility shall be purchased, leased, acquired, sold or in any manner disposed of, without the assent of a majority of the taxpayers, who must be qualified electors of the City, voting on the question at a general or special election at which such question may be submitted.”

Section 27-910, Arizona Code, Annotated, 1939:

“27-910. Complaint—Contents.—The complaint must contain: The name of the person in charge of the public use for which the property is sought, or plaintiff, the names of all owners and claimants of the property, if known, or a statement that they are unknown, as defendants; a statement of the right of plaintiff; if a right-of-way for any road, ditch, canal or other purpose be sought, the location and general route, accompanied with a map thereof; and a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. [R. S. 1901, par. 2454; 1913, par. 3082; rev., R. C. 1928, par. 1338.]”

Section 21-429, Arizona Code, Annotated, 1939:

"21-429. Defenses and objections—How presented.—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion; (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one (1) or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. (Rules Civ. Proc., Rule 12 (b).)"

PARTS OF
MUNICIPAL REVENUE BOND ACT OF 1943.

(Sections 16-2603-4-5-6-7, and 16-2617.)

(cited in brief)

16-2603. Powers of municipalities.—In addition to any powers it may now have a municipality shall have power: 1. subject to the requirements and restrictions of sections 16-604 and 16-605, Arizona Code of 1939 (sections 3 and 4, chapter 77, Session Laws of 1933, regular session), within or without its corporate limits, to construct, improve, reconstruct, extend, operate, maintain, and acquire, by gift, purchase, or the exercise of the right of eminent

domain, any utility undertaking or part thereof, and acquire in like manner land, rights in land, or water rights in connection therewith; 2. to issue its bonds to finance the cost thereof, and, 3. to pledge to the punctual payment of the bonds and interest thereon an amount of the revenue of the utility undertaking, including improvements or extensions thereafter constructed or acquired, sufficient to pay the bonds and interest as the same shall become due, and to create and maintain reasonable reserves therefor. The amount pledged may consist of all or any part of such revenue. The governing body of the municipality, in determining the cost of the utility undertaking for which bonds are to be issued, may include all costs and estimated costs of the issuance of the bonds, all engineering, inspection, fiscal, and legal expenses allowed by law, and interest which it is estimated will accrue on money borrowed or which will be borrowed during the construction period and for six (6) months thereafter. (Laws 1943, ch. 31, Sec. 3, p.)

16-2604. Vote on bond issues.—Questions of bond issues under this act shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose, as provided in this act. (Laws 1943, ch. 31, Sec. 4, p.)

16-2605. Election resolution.—(a) The governing body shall adopt an election resolution calling an election upon the question of the issuance of bonds, such resolution shall state in substance: 1. the maximum amount of bonds to be issued; 2. the purpose for which the bonds are to be issued; 3. the maximum rate of interest which the bonds are to bear; 4. a brief, concise statement (which

need not include any detail other than the mere statement of the fact) showing that the bonds will be payable solely from revenues; 5. the date on which the election is to be held; 6. the places where votes may be cast; and, 7. the hours between which polling places will be open.

(b) The election resolution shall be published in full at least once, not less than fifteen (15) days nor more than thirty (30) days prior to the date of the election, in a newspaper published in the county of general circulation in the municipality; or, if there be no such newspaper, the resolution shall be printed in full and posted in five (5) conspicuous places in the municipality not less than fifteen (15) days nor more than thirty (30) days prior to the date of the election. (Laws 1943, ch. 31, Sec. 5, p.....)

16-2606. Registration.—The governing body may require the registration of all persons desiring to vote at the election, in which case the election resolution shall state the dates, times and places when and where such persons may register. Registration shall begin not less than ten (10) days, and shall close not less than five (5) days, prior to the date of the election. (Laws 1943, ch. 31, Sec. 6, p.)

16-2607. Ballots.—At the election the ballot shall contain the phrases "For the Bonds" and "Against the Bonds." To the right of and opposite each of said phrases shall be placed a square, approximately the size of the squares placed opposite the names of candidates on ballots. The voter shall indicate his vote "For the Bonds" or "Against the Bonds" by inserting the mark "X" in the square opposite such phrase. No other question, word, or figure need be printed on any ballot. The ballot need not be any particular size, nor need sample ballots be

printed, posted, or distributed. A number of ballots, exceeding by not less than ten (10) per cent the number of registered voters whose names appear on the precinct register of the precinct, town, or city for which printed, shall be printed for and furnished to each polling place. Voting machines shall not be used at any election held under this act. (Laws 1943, ch. 31, Sec. 7, p.)

“16-2617. Bonds not debt of municipality.—No holder of any bonds issued under this act shall have the right to compel any exercise of the taxing power of the municipality to pay said bonds or the interest thereon. Each bond issued under this act shall recite in substance that the payment of said bond and the interest thereon is enforceable exclusively from the revenue pledged to its payment. Bonds issued under this act by any municipality shall not be a debt of the municipality, nor shall payment thereof be enforceable out of any funds other than the revenue pledged to the payment thereof. (Laws 1943, ch. 31, par. 17, p.....)”

Section 16-603, Arizona Code, Annotated 1939.

“16-603. Authorization at Election.—Before any construction, purchase, acquisition or lease, by any municipal corporation, as authorized in section 1 (par. 16-602), of any plant or property, or any portion thereof, devoted to the business of or services rendered by a public utility, shall be undertaken, such construction, purchase, acquisition or lease must be authorized by the affirmative vote of a majority of the qualified electors, who are taxpayers, of such municipal corporation voting at a general or special municipal election duly called and held for the purpose of voting upon such question. (Laws 1933, ch. 77, par. 2, p. 313.)”

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND
POWER COMPANY, a Corporation,
Appellee.

Appellant's Reply Brief

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Upon Appeal from the District Court of the United
States for the District of Arizona.

Service of the within and receipt of three copies there-
of is hereby admitted this.....day of
A. D. 1945.

DARNELL & ROBERTSON,

By.....

Attorneys for Appellee

FILED
AUG 28 1945
PAUL P. O'BRIEN,
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TABLE OF AUTHORITIES CITED

Cases

	Pages
In Re - Brooklyn, 38 N. E. 983, 26 L. R. A. 270.....	4
Brown v. United States, 263 U. S. 78, 68 L. Ed. 171.....	7
Central Nebraska Public P. & In. Dist. v. Fairchild, 126 F (2d) 302.....	7
City of Los Angeles v. Goger, 10 Cal. A. 378, 102 Pac. 17..	7
City of Oakland v. Wheeler, 34 Cal. A. 442, 168 Pac. 23....	7
City of Pasadena v. Railroad Com., 183 Cal. 526, 192 Pac. 25	3
City of Phoenix v. Wright, 52 Ariz. 227, 80 Pac. (2d) 390 at 392, 393, points 3 and 4.....	4
Crandall v. Town of Safford, 47 Ariz. 402, 56 Pac. (2d) 660, 663	9
Long, et al v. Town of Thatcher, et al, 153 Pac. (2d) 153..	8
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165; 17 Sup. Ct. 718.....	4
Los Angeles v. Southgate, 291 Pac. 654.....	4
Menderson v. Phoenix, 51 Ariz. 280 at 289; 76 Pac. (2d) 321	4
Municipal Water Dist. v. Marine Water & Power Co. et al, 178 Cal. 308, 173 Pac. 469.....	7
South Tucson v. The Tucson Gas, Electric Light and Power Company, No. 10921, 9th C. C. A.....	9
State v. Jaastad, 32 Pac. (2d) 799, 43 Ariz. 458 at 463.....	3
Wiser Valley Land and Water Co. v. Ryan, 190 Fed. 417..	7

Texts

McQuillin Mun. Corp. 2d Ed. Revised, Volume 4, section 1654	3
--	---

Statutes

Arizona Code, Annotated, 1939, Section 16-604.....	7
Arizona Code, Annotated, 1939, Section 16-604 (3).....	6
Arizona Code, Annotated, 1939, Section 16-2603.....	5
Arizona Code, Annotated, 1939, Section 16-2618.....	2
Arizona Code, Annotated, 1939, Section 27-919.....	7

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Appellant's Reply Brief

I

Appellee's contentions in reply to Appellant's proposition of law number one to the effect that,

"The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee utility as described in the complaint herein"

are based upon three premises, (Appellee's Brief, pages 5 and 6) as follows:

- (a) That appellant had no authority to institute the action to condemn for the reason that no election granting the authority as

required by Appellant's Charter, par. 25, chap. 4, and Arizona Municipal Revenue Bond Act of 1943, (Arizona Code, Anno. 1939, sec. 16-2601 to 16-2619 inclusive) had been held, and

- (b) That the Court had jurisdiction only of Pima County property under the Arizona Eminent Domain Law, (Arizona Code, Anno. 1939, sec. 27-909), for the reason that the action was only filed in Pima County, and
- (c) That Appellant by taking property of Appellee outside Appellant's corporate limits would be taking property in public use and devoting it to private use in violation of Section 27-907 Arizona Code Anno. 1939 and Section 17, Article 2, Arizona Constitution.

It is submitted that Appellee's contention concerning the requirement of holding an election before filing an action in condemnation has been fully answered by Appellant in its Opening Brief, pages 10 to 12, and that by the specific provisions of Section 16-2618, Arizona Code Anno. 1939, such an election is not necessary.

It is further submitted that the charter authority of Appellant to condemn has been delegated by the State and that

“When a state delegates to a municipality the right to condemn private property for a public use, and does not in the act delegating such au-

thority provide a method for its exercise, the general law of the state prescribing the procedure, and the method of ascertaining the damages is, by implication, a part of the law delegating the power.”

McQuillin Mun. Corp. 2d Ed. Revised, Volume 4, section 1654, at top of page 645.

It is further submitted that Appellant is operating under a so-called home rule or freeholders charter and that as such it cannot legislate nor act in matters of state-wide concern save and except in compliance with the provisions of the statutes of the state.

State v. Jaastad, 32 Pac. (2d) 799, 43 Ariz. 458 at 463.

Appellee's contention that the court had jurisdiction only of property in Pima County overlooks the fact that the action was removed to the United States District Court by Appellee and that said court can exercise jurisdiction throughout the State of Arizona. Further, on the motion to dismiss which was before the lower court it was immaterial whether separate actions had been filed in the other counties of the state for the reason that there is no requirement that each of said actions be filed simultaneously or in any order of succession. Nor is there any statute of limitations fixing a time limit within which an action shall be brought. Appellant admits it has been unable to find any cases in point on this question.

Appellee's contention that the taking of its property outside Appellant's corporate limits would be devoting it to private use, is untenable, for, as said by the court in *City of Pasadena v. Railroad Com.*, 183 Cal. 526, 192 Pac. 25,

“It is not true that a city is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a city does not change its character by engaging in such enterprises.”

The foregoing was quoted with approval by the Arizona Supreme Court in a case cited by Appellee in its brief at page 27, *Menderson v. Phoenix*, 51 Ariz. 280 at 289; 76 Pac. (2d) 321. See also, *City of Phoenix v. Wright*, 52 Ariz. 227, 80 Pac. (2d) 390 at 392, 393, points 3 and 4.

It naturally follows, therefore, that a proprietary use is as much a public use as is a governmental function a public use. It is impossible for a municipal corporation to exercise a private use of anything. It may engage in an enterprise that is in the nature of a private enterprise but in so doing it is nevertheless a public corporation operating as such for the public of which it is comprised.

In re Brooklyn, 38 N. E. 983, 26 L. R. A. 270;

Los Angeles v. Southgate, 291 Pac. 654;

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165; 17 Sup. Ct. 718;

In addition to the foregoing contentions in reply to Appellant's proposition of law number one to the effect that;

“The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee utility as described in the complaint herein,”

Appellee further contends that

- (d) No adequate method is provided by law for valuation of utility property, for the reason that under section 27-909 Arizona Code, Annotated 1939, four different judgments as to four different parts of the operating property, without reference to their value as a whole, would result, and
- (e) Valuation as of date of the summons as provided in section 27-916 Arizona Code, Annotated 1939, would deprive Appellee of compensation for extensions or additions made to property during litigation, and
- (f) Proposed taking violates due process provisions of both federal and state constitutions for the reason that the Appellee can be forced to forego any relief, by annulment of the proceedings, in the event it cannot obtain the value of the property fixed by the judgment by levy or execution, under the provisions of section 27-918, Arizona Code, Annotated 1939.

The answer to Appellee's contention that no adequate method is provided for valuation of the property, is found in section 16-2603, Arizona Code, Annotated 1939, which section provides for the exercise of the right of eminent domain by a municipality in the acquisition of a public utility, subject, however, to the requirements of sections

16-604 and 16-605, Arizona Code, 1939. Said sections provide three methods for determining the compensation to be paid for the taking of private property, one of which is by a court of competent jurisdiction, sitting for that purpose,

Arizona Code, Annotated 1939, sec. 16-604 (3);

the amount to be determined being the fair valuation, which shall be the equivalent of the compensation to be paid for the taking of private property for a public use under the provisions of sections 27-907 to 27-921, Arizona Code, Annotated 1939.

It will be noted that the procedure to be followed is a judicial proceeding, and that the valuation is to be determined by either court or jury after hearing evidence. Such being the procedure outlined by the statute it can make no difference whether the valuation is fixed by one or more judges or juries just so long as the opportunity to present the facts to a judicial body is afforded the Appellee, together with the full right of appeal from any such judgment or judgments.

It is next contended that Appellee is to be deprived of compensation for extensions and betterments made to the property during litigation by fixing the valuation as of date of summons.

Such an argument presupposes the power in the Corporation Commission to require such extensions and betterments to be made during the time the property is in custodia legis.

Many courts have affirmed the fixing of the valuation as of the date of the summons.

Wiser Valley Land and Water Co. v. Ryan, 190 Fed. 417.

Brown v. United States, 263 U. S. 78, 68 L. Ed. 171.

Central Nebraska Public P. & In. Dist. v. Fairchild, 126 F (2d) 302.

City of Los Angeles v. Goger, 10 Cal. A. 378, 102 Pac. 17.

City of Oakland v. Wheeler, 34 Cal. A. 442, 168 Pac. 23.

Municipal Water Dist. v. Marine Water & Power Co. et al, 178 Cal. 308, 173 Pac. 469.

The final contention of Appellee in reply to Appellant's proposition of law number one is to the effect that the proposed taking violates due process for the reason that no relief is afforded it in the event it cannot obtain the value of the property fixed by the judgment.

Appellee evidently has overlooked the fact that it is not entitled to any compensation until and unless the property is taken.

Section 16-604, Arizona Code 1939 Anno.

and no final order of condemnation can be made until the judgment is satisfied.

Section 27-919, Arizona Code 1939 Anno.

It may be that a public utility being operated for private profit should not be subjected to any business hazards such as the right of a municipality to institute con-

demnation proceedings for the acquisition of its properties, but it is submitted that the right of condemnation is and has always been a prerogative of the state and that in the instant case an exercise of that prerogative with a requirement of just compensation being first made in the event of a taking is not a denial of due process but merely a hazard to be considered when private enterprise engages in business as a public utility.

II.

Appellant is of the opinion that its argument as set forth in its Opening Brief in support of proposition of law number two is a sufficient reply to Appellee's contentions on said proposition with the exception of the point made on page 42 of Appellee's brief to the effect that a municipality in Arizona may not condemn utility property serving another municipality.

In support of this contention Appellee relies upon the Arizona case of Long, et al, v. Town of Thatcher, et al., 153 Pac. (2d) 153.

It should be noted that in the Thatcher case the City of Thatcher was attempting to purchase not only the physical property of the utility company which was operating within the town of Safford but it was also attempting to purchase, without the consent of the town of Safford, the franchise which the town of Safford had granted to the utility company, with the result, that the town of Thatcher would have been operating in the town of Safford under a franchise from Safford which it had obtained without the consent of Safford. This the court said could not be done.

It can be readily seen that the case at bar is entirely different, for the reason that the Appellee is not operating under a franchise in any place, except within the corporate limits of Appellant, (Appellee's Brief page 42) and that no property rights of another municipality are involved. The same is true concerning the case cited by Appellee which was recently decided by this court but which has not yet appeared in the reporter system, *Town of South Tucson v. The Tucson Gas, Electric Light and Power Company*, No. 10921, Ninth Circuit of Appeals. In that case the town of South Tucson was attempting to condemn with other property a franchise granted by the City of Tucson and the court said it could not be condemned. In the instant case no property rights of any municipality are involved and it is submitted that in such a situation, the mere fact that the utility is operating within another municipality is not a bar to another municipality acquiring the property.

Crandall v. Town of Safford, 47 Ariz. 402, 56 Pac.
(2d) 660, 663.

In conclusion Appellant presents that the complaint herein having stated a claim against Appellee upon which relief could be granted, the motion to dismiss should have been denied.

Respectfully submitted,

THOS. J. ELLIOTT,

Attorney for Appellant.

